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THE LAW
OF
GENERAL AVERAGE
ENGLISH AND FOREIGN.

BY
THE LATE
RICHARD LOWNDES,
AVERAGE ADJUSTER,
AUTHOR OF "THE ADMIRALTY LAW OF COLLISIONS AT SEA,"
"A PRACTICAL TREATISE ON MARINE INSURANCE,"
ETC., ETC.

FIFTH EDITION.

BY
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JOINT EDITOR OF "ARNOULD ON MARINE INSURANCE," "MACLACHLAN'S LAW OF
MERCHANT SHIPPING," AND "SMITH'S MERCANTILE LAW"; OF THE
INNER TEMPLE AND NORTH-EASTERN CIRCUIT,
BARRISTER-AT-LAW;
AND
GEORGE RUPERT RUDOLF,
MEMBER OF THE ASSOCIATION OF AVERAGE ADJUSTERS.

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PREFACE TO THE FIFTH EDITION.



OWING to the lamented death of Mr. LOWNDES since the fourth edition of this Treatise was published in 1888, it has been necessary to entrust the preparation of a New Edition to other hands.

A comparison of the existing conditions of commerce with those that prevailed when Mr. LOWNDES wrote shows that many changes have taken place in the interval. As is pointed out in the discussion in the text on the treatment of complex salvage operations, the general substitution of steamships for sailing vessels, of telegraphy for the slower means of communication by letter, and other modern innovations, have not only largely affected the methods of carrying out established principles in practice, but have also brought into existence many difficulties not considered in the previous editions of this Work. Some of the problems fully discussed by Mr. LOWNDES have therefore lost much of their practical importance, but the arguments that he used to establish the principles for which he contended are capable of such wide application, that the Editors have thought it advisable to include them in full, even though the particular point may not now possess the same claim to consideration as when he wrote.

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The cases bearing on the subject of General Average, decided in the course of the twenty-four years which have elapsed since the last edition appeared, are fully noticed; and in several instances it will appear that the decisions confirm the views previously expressed by Mr. LOWNDES, and bear testimony to the influence of his writings on the development of the law of General Average. It has been found possible to retain most of his text unchanged, and to denote additions or material alterations by inserting the new matter in brackets. On some of the controversial questions discussed in the Work (*e.g.*, the jettison of deck cargo, contribution for damage by water to goods already on fire, complex salvage operations), the Editors do not agree with Mr. LOWNDES' conclusions; but whenever they dissent from his views they have reproduced his statements of opinion *in extenso*, and, as has already been said, have clearly distinguished them from their own.

The almost universal incorporation of the York-Antwerp Rules in charter-parties, bills of lading and policies of insurance, has prevented disputes which otherwise must have arisen, under circumstances of frequent occurrence, on certain points which cannot yet be considered definitely settled in our law. The Rules which were in use when Mr. LOWNDES wrote have been amended and enlarged at the Conference of the Association for the Reform and Codification of the Law of Nations, held at Liverpool in 1890. The present Rules are set out in one of the Appendices, with an account of their history and references to decisions in England and other countries on their construction.

The law of General Average in the United States closely resembles our own, though differing therefrom

on some points. The main cause of the similarity is, that the English common law is the foundation on which the structure of American law has been reared. It is true that legal decisions on the law of General Average were almost entirely wanting when the United States broke away from the mother country; but the later judgments of the English Courts have always been studied and treated with respect by the American judges, and have greatly influenced the jurisprudence of the United States.

So also, the English judges and text-writers have often derived valuable assistance from the American Reports; and, as will appear in the course of this work, there is one difficult subject, viz., voluntary stranding, on which there is a singular lack of authority in this country, and a series of admirable judgments of the American Courts. An entirely new Appendix, containing a full statement of the law of General Average and the practice in the United States, has been written for this edition by a prominent average adjuster of New York, Mr. W. R. Coe, to whom the Editors are greatly indebted for his valuable contribution. An additional Appendix contains the Rules of Practice of the Association of Average Adjusters of the United States.

The principal Appendices on foreign laws have been revised or re-written by gentlemen eminently qualified to expound the law of General Average of their respective countries; and the Editors wish to express their gratitude to these gentlemen (whose names are particularly mentioned in these Appendices) for the assistance which they have so kindly given. New Codes have taken the place of several set out in the last edition of this Work, the most noteworthy being the Scandinavian

Code, of which Mr. LOWNDES published a draft, and which has since been adopted by all three Scandinavian States, and that of Portugal which came into force in 1889. A new Appendix states the law of General Average in Austria, the only Continental State without a Commercial Code. Other Appendices have been added, containing extracts from the Codes of Greece, Japan, Mexico and Venezuela, the translation in the case of the Venezuelan Code being made from a text courteously placed at the disposal of the Editors by Mr. WILLIAM BOWSTEAD, General Editor of "The Commercial Laws of the World."

The Index has been greatly enlarged and contains many new headings, the dates of all the cases cited have been inserted, and the Table of Cases now gives references to all the Reports of the English Cases.

E. L. DE H.

G. R. R.

LONDON,

December, 1911.

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COMPARATIVE TABLE OF THE LAWS OF GENERAL AVERAGE.

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§ 1.

General Principles.

§ 1. General Principles.										
UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHILE.	FRANCE.	GERMANY.	GREECE.	HOLLAND.	
1.—Can there be gen. average when the danger has resulted from the unseaworthiness of the ship, <i>once proper</i> of the cargo, or fault of master or crew?	Yes, if the claimant is not in fault, or responsible for those in fault (pp. 31—39)	.....	Not (p. 464)	Not, if due to defect of ship or fault of captain or crew (p. 479)	.....	Not, if result of negligence of master or crew, unless bill of lading exempts shipowner from this liability; other points apparently undetermined (p. 502)	Yes; the party responsible, however, not only cannot recover contribution, but is liable to each contributor to the extent of his payment (pp. 521, 547)	Not, if due to unseaworthiness of ship or negligence of master or crew (p. 562)	Not, where fault of shipowner; doubtful where fault of owner of cargo (pp. 575—577)	1
2.—Can there be gen. average when the measures taken are unsuccessful?	Not, except so far as is necessary to restore eventual equality (pp. 42, 43)	Not, if ship lost in same peril (p. 452)	Not (p. 466) ...	Not, if ship lost in same peril (p. 483)	.....	Not, if ship and cargo both lost (pp. 500, 507)	Not, unless ship as well as cargo, wholly or in part, have been saved (p. 522)	Not, if ship lost in same peril (p. 564)	Not, if ship lost in same peril (p. 589)	2
3.—Formal definition of gen. average.	Loss caused by or directly consequential on an extraordinary sacrifice or expenditure voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure (p. 25)	A voluntary and deliberate act, and its consequences, done to escape an imminent danger (p. 452)	The extraordinary expenses incurred and the damage voluntarily sustained for the common good and safety of the ship and of the cargo (p. 464)	Losses caused voluntarily in case of peril or unforeseen disaster, or suffered as immediate consequences of such measures, and expenses incurred under like circumstances after deliberation, for the common good and safety of ship and cargo, from loading and departure until arrival and discharge (p. 479)	Damage caused in pursuance of a resolution taken before or after the ship has commenced its voyage, to the ship and cargo, conjointly or separately, in order to save them from imminent sea risk; also such damage as is a direct and inevitable consequence of the sacrifice and expenses incurred for the general benefit at the time incurred (p. 485)	In general, damage voluntarily sustained and expenses incurred after the ship has commenced its voyage, to the common good and safety of the ship and cargo, from their loading and departure to their arrival and discharge (p. 489)	All damage intentionally done to ship and cargo, or both, by the master, or by his orders, for the purpose of rescuing both ship and cargo from danger, together with any further damage caused by such measures, and also expenses incurred for the same purpose (p. 520)	All extraordinary expenses and damage, having for their object the common benefit and preservation of the ship and cargo, which in the like circumstances are, after due deliberation, incurred for preservation and common good of ship and cargo (p. 574)	In general, all losses which are purposely incurred in case of danger or distress, and their immediate consequences, as also expenses which in the like circumstances are, after due deliberation, incurred for preservation and common good of ship and cargo (p. 574)	3

ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
Not, if due to <i>vice proprii</i> of cargo (p. 604); or unseaworthiness of ship (pp. 602, 604); or fault of captain or crew (pp. 602, 605); unless bill of lading exempt-shipowner from liability for latter (p. 610)	Yes, but, there is recourse against the person from whose fault the damage arose (p. 615; see also p. 618)	No (p. 692) ...	Same as Mexico (p. 637)	.....	Not, if captain or crew were in fault (p. 656)	Same as England (p. 698)	No (pp. 683, 665, 659)	Yes, except so far as the claimant is in fault, or responsible for those in fault (p. 730). For the effect of the Harter Act, see pp. 731 <i>et seq.</i>	Same as Argentine Republic (p. 779)	Not, if resulting from ship's defect; or unseaworthiness, or if captain or crew were in fault (p. 785)
Not, if sacrifice does not save ship (p. 607)	.....	Not if ship lost in same casualty (p. 631)	Do.	Not, if ship lost in same peril (p. 642)	.....	Yes (p. 698)	Not, if ship lost in same peril (p. 680)	Not, except so far as is necessary to restore equality (see pp. 720-729)	Same as Argentine Republic (p. 782)	Not, if ship lost in same peril (p. 787)
The extraordinary expenses incurred, and the damages voluntarily sustained, for the good and for the common safety of ship and cargo (p. 597)	All damage and expense arising from any disposition made by the master in regard to the ship or cargo to save both from a common danger (p. 616)	All losses and expenses liberally incurred to save ship or cargo, or both together, from a known and real risk (p. 622)	Do.	All extraordinary expenses incurred and sacrifices made voluntarily by the captain to avoid a danger, for the common safety of ship and cargo, from loading and departure to return and discharge (p. 638)	Whatever is incurred for the safety of ship, crew and cargo (p. 654)	All damage purportedly caused to ship or cargo to save ship and cargo from any danger, both, and every other sacrifice made for such purpose, and also all damage and loss directly occasioned thereby (p. 681)	In general, all losses and expenses purposefully incurred to save the ship, her cargo, or both together, from a known and real danger (p. 660)	Sacrifices voluntarily made of part of the ship or cargo to save the residue from an impending peril, an extraordinary expense incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise (p. 727)	Same as Argentine Republic (p. 779)	All damage caused intentionally, after deliberation, before or after the commencement of the voyage to the ship or cargo for the common benefit to save them from a peril of the sea; damage consequent on the sacrifice; and expenses incurred due to unforeseen causes incurred for the common benefit at the times stated (p. 783)

COMPARATIVE TABLE OF THE LAWS OF GENERAL AVERAGE—*continued*.

XXXVII

UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHILE.	FRANCE.	GERMANY.	GREECE.	HOLLAND
What Sacrifices of Property constitute General Average?									
Pt. I.—SACRIFICES OF CARGO.									
4.—Jettison of cargo from below deck.	General average (p. 54)	General average (p. 424)	General average (p. 465)	General average (p. 478)	General average (p. 485)	General average (p. 497)	General average (p. 523)	General average (p. 560)	General average (p. 568)
5.—Jettison of deck cargo.	In practice, not allowed unless deckload carried according to usage, and not in violation of contract (p. 76) Where deckload agreed to by all parties, should, on principle, be allowed (See pp. 72-76)	Not gen. aver., except in small coasting trade, or river navigation, or when loading on deck is customary (p. 436)	Not gen. average (p. 466)	Not gen. average (p. 483)	Not gen. aver., unless deckload agreed to by all parties (p. 487)	Not gen. aver., except on short coasting voyages (p. 506)	Not gen. aver., except in coasting voyages, where deckloading has been sanctioned by the laws of the states (p. 529)	Not gen. average (p. 564)	Not properly gen. average, but there may be an interim apportionment leaving ship-owner eventually liable, if goods loaded on deck without their owner's consent; if loaded with his consent, probably not gen. average (p. 588)
6.—Damage to cargo by water-shipped during jettison, or otherwise necessarily occasioned to the cargo through the jettison.	General average (p. 82)	General average (p. 424)	General average (p. 460)	General average (p. 478)	General average (p. 485)	General average (p. 498)	General average (p. 523)	General average (p. 560)	General average (p. 568)
7.—Jettison, owing to <i>vice propre</i> of cargo, e.g., spontaneous combustion.	General average, but not so as to enable any party to take advantage of his own wrong (p. 80)	.....	.....	.....	.....	.....	The party himself in fault can make no claim; and must make good the contributions or losses of others (p. 521)	.....	Not gen. average (p. 576)
8.—Damage done in quenching fire; to packages not yet on fire.	General average (p. 82)	.....	In practice, gen. average (p. 461)	.....	.....	General average (p. 514)	General average (p. 554)	General average (p. 561)	In practice, gen. average (p. 574)

ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
General average (p. 595)	Presumably gen. aver. (p. 616)	General average (p. 623)	Same as Mexico (p. 637)	General average (p. 639, see p. 641)	General average (pp. 654, 657)	General average (p. 691)	General average (p. 681, § 811.2)	General average (p. 745)	Same as Argentine Republic (p. 779)	General average (p. 783)
Not gen. aver., except in cases of coasting voy- ages and navi- gation of rivers and lakes, but there may be a special con- tribution as amongst those who have con- sented in writ- ing to the deck- loading (p. 606)	Not gen. aver., except on short coasting voy- ages (p. 616)	Not gen. aver., except in coast- ing trade when allowed (p. 630)	Do.	Not gen. aver., but there may be a special contribution (p. 641)	Not gen. average (p. 657)	Not gen. aver., unless to lighten the ship when aground (p. 696)	Not gen. aver., except in coast- ing trade when allowed (pp. 683, 678)	Not general average except where deck- loading sanctioned by a reasonable cus- tom of particular trade (p. 745)	Do.	Not gen. aver., except in coast- ing trade (p. 786)
General average (p. 599)	.....	General average (p. 623)	Do.	.....	General average (p. 656)	General average (p. 691)	General average (p. 661)	General average (p. 746)	Do.	Presumably gen. aver. (p. 783)
.....	.....	.....	.....	.....	..	.....	.....	Probably the same as England, at pre- sent the law is un- settled (see p. 731)	.....	.....
General average (p. 595)	(See p. 625)	Same as Mexico (p. 637)	General average (p. 691)	(See p. 658)	General average (pp. 731, 746)	General average (p. 783)

COMPARATIVE TABLE OF THE LAWS OF GENERAL AVERAGE—*continued*.

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	UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHIL.	FRANCE.	GERMANY.	GREECE.	HOLLAND
9.—Damage done in quenching fire; to packages, actually on fire.	..... In practice not general average (pp. 43-95)	.....	General average (p. 453)	In practice, gen. average (p. 461)	.....	.....	General average (p. 514)	General average (p. 554)	Apparently gen. average (p. 561)	Apparently gen. average (p. 574)
10.—(Cargo burnt as fuel for steamer.	General average, if original sup- ply adequate (p. 98)	.....	As in England (p. 453)	General average (p. 460)	.....	...	As in England (p. 514)	.....	.....	.....
11.—Damage to cargo, done in discharging it to get stranded ship off.	General average (p. 100)	General average (p. 425)	General average (p. 453)	Do.	General average (p. 479)	.....	General average (p. 517)	General average (p. 554)	General average where discharg- ed for common benefit (p. 561)	General average (p. 570)
12.—Ditto, to lighten ship in a port of refuge.	General average (p. 101)	Apparently gen. average if vessel in peril (p. 425)	Do.	Do.	.....	Apparently gen. average (p. 480)	General average (p. 516)	In practice, gen. average (p. 552)	Do.	In practice, gen. average if dis- charged in an unusual manner (p. 570)
13.—Ditto, in warehouse at port of discharge.	Not gen. average (p. 102)	.....	General average (p. 451)	.....	.....	.....	See p. 516	Apparently not (p. 552)	.....	Not gen. average (p. 568)
14.—Damage to cargo by voluntary stranding of ship.	In practice not general average, unless done to extinguish fire. See discussion (pp. 143 <i>et seq.</i>)	.....	.....	Not gen. average if ship sinking or driving ashore (p. 460)	.....	.....	General average (p. 498)	See answer to No. 29 (p. 524)	General average (p. 561)	General average (p. 571)
15.—(b) <i>Sacrifices of effects of Passengers and Crew.</i>	Probably general average (pp. 103-106)	General average (p. 436)	Crew's effects general average (p. 456)	General average (p. 465)	.....	.....	Crew's effects general average (p. 500), and probably those of passengers (p. 517)	General average (p. 536)	General average (p. 563)	General average (p. 587)

ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
.....	Not gen. average (p. 697)	.....	Not general average (p. 768)	... ..	Apparently gen. average (p. 783)
.....	General average (p. 694)	.....	General average, if supply adequate (p. 747)	.....	.....
General average (p. 601)	General average if stranding voluntary (p. 654)	General average (p. 692)	General average if stranding voluntary (p. 661)	General average (p. 717)	Same as Argentine Republic (p. 779)	Presumably gen. average (p. 783, § 768 (4))
Do.	General average (p. 655)	Not gen. aver., unless done in some unusual way (p. 692)	.....	General average (pp. 747, 755)	Do.	.....
.....	Not gen. average (p. 655)	Not gen. average (p. 693)	.....	Not general average (p. 748)	.....	.....
General average, except when ship lost (p. 601)	General average with limitations (p. 654)	General average (p. 692)	General average (p. 661)	See answer to No. 29, and see p. 748	.....	Apparently gen. average, if to avoid capture or total loss (p. 783)
General average (p. 606)	Sacrifice of clothing of passengers and crew, general average (p. 615)	General average (p. 641)	General average (p. 701)	Sacrifice of property of crew, general average (p. 661)	Sacrifice of passengers' baggage stowed in holds, general average (p. 748)	Same as Argentine Republic (p. 779)	Sacrifice of property of crew, general average (p. 783)

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COMPARATIVE TABLE OF THE LAWS OF GENERAL AVERAGE—continued.

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	UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHILI.	FRANCE.	GERMANY.	GREECE.	HOLLAND.
(c) <i>Sacrifices of Ship's Materials:—</i>										
16.—Masts cut away for the common safety.	General average (p. 110)	General average (p. 424)	General average (p. 453)	.....	General average (p. 478)	General average (p. 486)	General average (p. 497)	General average (p. 523)	General average (p. 560)	General average (p. 568)
17.—Chains and anchors unless irretrievably foul.	General average, unless irretrievably foul (p. 133)	Do.	Do.	.....	Do.	Do.	Do.	Do.	Do.	Do.
18.—Damage by carrying a press of canvas or steam.	Not gen. average (p. 111)	Apparently gen. average (p. 424)	Same as France (p. 453)	Not gen. average (p. 460)	Do.	Do.	General average if to prevent running aground (p. 513)	Particular average (p. 529)	.....	Not gen. average (p. 574)
19.—Damage by cutting a ship open to extract the cargo.	General average	General average (p. 424)	When to save cargo from a wreck, charge on cargo (p. 453)	.....	.....	General average (p. 486)	General average (p. 508)	.....	.....	In practice, gen. average (p. 574)
20.—Loss by cutting away wreck of spars previously carried away.	Not gen. average, when hopelessly lost or valueless (p. 118)	.....	General average to extent of value sacrificed (p. 453)	Not gen. average (p. 460)	.....	.....	General average on estimated value as wreck (p. 497)	General average on estimated value as wreck (p. 516)	.....	In practice, one-half of cost of new materials, as representing the damaged value, is allowed in gen. average (p. 574)
21.—Damage to sails used to force a stranded ship off the ground.	General average (p. 115)	.....	General average (p. 453)	.....	.....	.....	Not gen. average, if vessel not in peril (pp. 513, 515)	General average (p. 550)	.....	In practice, gen. average (p. 574)
22.—Damage to steamer's machinery from being worked as to expose them to extraordinary danger.	General average, if engines so worked as to expose them to extraordinary danger (p. 141)	.....	Do.	General average (p. 460)	.....	.....	Do.	Do.	.....	Do.
23.—Coals consumed by steamer during such working.	General average (p. 142)	.....	Do.	.....	.....	.....	Do.	.....	.....	Do.

	ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
16	General average (p. 598)	.....	General average (p. 623)	Same as Mexico (p. 637)	Presumably gen. average (p. 639). See p. 642.)	General average (p. 654)	General average (p. 691)	General average (p. 661)	General average (p. 741)	Same as the Argentine Republic (p. 779)	General average (p. 786)
17	Do.	.....	Do.	Do.	Do.	Do.	Do.	Do.	General average (p. 740)	Do.	Do.
18	General average (p. 602)	.....	.....	.....	.....	Not gen. average (p. 655)	Not gen. average (p. 697)	If to escape from wreck or capture, allowed in general average (p. 661)	Not general average (p. 741)	.....	.....
19	.....	.....	General average (p. 623)	Same as Mexico (p. 637)	.....	.....	.....	General average (p. 661)	.....	Same as the Argentine Republic (p. 779)	Apparently gen. average (p. 785)
20	Value in damaged condition allowed in gen. average (p. 598)	.....	.....	.....	.....	General average, if lower part of mast remains in good condition (p. 655)	Not gen. average (p. 697)	.....	Value in damaged condition allowed as general average, as a rule (p. 742)	.....	.....
21	General average (p. 602)	.....	.....	.....	.....	General average, if stranding is voluntary (p. 651)	General average (p. 697)	.....	General average, if damage contemplated (p. 742)	.....	Presumably gen. average (p. 783, & 708-4)
22	Do.	.....	.....	.....	.....	Do.	General average (pp. 692, 697)	.....	Do.	.....	Do.
23	General average (p. 601)	Do.	General average (p. 694)	Do.

COMPARATIVE TABLE OF THE LAWS OF GENERAL AVERAGE—continued.

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	UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHILI.	FRANCE.	GERMANY.	GREECE.	HOLLAND.
(c) <i>Sacrifices of Ship's Materials</i> —										
24.—Things given as ransom to enemy or pirates.	General average (p. 108)	General average (p. 424)	General average (p. 455)	.....	General average (p. 478)	General average (p. 485)	General average (p. 497)	General average (p. 528)	General average (p. 566)	General average (p. 567) 24
25.—Damage done to ship, and ammunition expended in resisting a hostile attack.	Not gen. average (p. 116)	.....	Do.	.....	Do.	Do.	.....	General average (p. 525)	.....	Damage considered general average; ammunition not (p. 574) 25
26.—Compensation to seamen wounded in doing so.	Do.	General average (p. 425)	Do.	.....	General average (p. 479)	Do.	Cost of curing and medicine, general average (p. 498)	Do.	General average (p. 561)	General average (p. 568) 26
27.—Damage done to ship in order to extinguish a fire.	General average (p. 86)	.....	.....	General average (p. 461)	.....	General average (p. 486)	General average (p. 514)	General average (p. 554)	Do.	In practice, gen. average (p. 571) 27
28.—Hawsers or other ship's materials carried on deck contrary to maritime usage, and jettisoned.	Not gen. average (p. 112)	.....	Not gen. average (p. 453)	.....	.....	.....	Not gen. average, except on short coasting voyages (p. 517)	Not gen. average (p. 519)	.....	Not gen. average (p. 574) 28
29.—Voluntary stranding, damage by.	See answer to No. 14, <i>supra</i> .	General average (p. 426)	General average, unless stranded, sinking or driving ashore or ship be not saved (p. 451)	Not gen. average, if vessel stranded or driving ashore (p. 466)	General average, if to prevent loss or capture by an enemy (p. 479)	General average (p. 486)	General average (p. 498)	General average when done to avoid sinking, or to avoid capture, and the vessel is not totally lost thereby (p. 524)	General average (p. 561)	General average (p. 571) 29
30.—Expenses of floating a stranded ship, or otherwise saving the property as a whole.	General average (p. 183)	Do.	.....	General average (p. 460)	General average (p. 479)	General average, if the stranding was voluntary (p. 488)	General average, where vessel in peril (pp. 498, 515)	General average (p. 525)	Do.	General average (p. 572) 30

(d) *Expenditures* :—

ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
General average (p. 586)	General average (p. 622)	Same as Mexico (p. 637)	.....	General average (pp. 654, 656)	General average (p. 694)	General average (p. 660)	General average...	Same as Argentine Republic (p. 779)	General average (p. 783)
.....	Damage general average: ammunition not mentioned (pp. 654, 656)	General average (p. 694) as general average (p. 692)	Damage allowed as general average (p. 692)	.....	.....	.....
General average (p. 595)	Same as France (p. 623)	Same as Mexico (p. 637)	.....	General average (pp. 658, 658)	Same as France (p. 694)	Same as France (p. 682)	Not general average	Same as Argentine Republic (p. 779)	General average (p. 784)
Do.	(See p. 625)	Do.	.....	.....	General average (p. 691)	(See p. 698)	General average (p. 743)	.....	General average (p. 783)
.....	Not gen. average (p. 697)	.....	Not general average (p. 740)	.....	.....
General average, except when ship totally lost (p. 601)	General average, with limitations (p. 654)	General average (p. 692)	General average (p. 661)	General average, unless ship would otherwise have stranded in substantially the same place (pp. 729, 741)	Same as Argentine Republic (p. 779)	Apparently gen. average, if to avoid capture or total loss (p. 783)
General average (p. 601)	General average, if stranding was voluntary (p. 623)	Same as Mexico (p. 637)	.....	General average, if successful, and if the stranding was voluntary (p. 654)	General average, but if the voyage is not continued, only up to the time that it was evident it must be given up (p. '92)	General average, if stranding was voluntary (p. 661)	General average (p. 750)	Do.	General average if stranding voluntary (p. 783)

COMPARATIVE TABLE OF THE LAWS OF GENERAL AVERAGE—continued.

	UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHILI.	FRANCE.	GERMANY.	GREECE.	HOLLAND.
(d) <i>Expenditures:—</i>										
31.—Expenses of a complex salvage operation, when property saved by a series of different operations.	Law not clear. In practice, usually treated as general average, until safety attained (p. 207)	.....	.....	.....	.....	General average, if the stranding eventually saved all expenses from first to last are general average (p. 456)	.....	.....	.....	According to circumstances (p. 572)
32.—Cost of reclamation of ship and cargo after capture or arrest.	.....	General average (p. 425), unless reclaimed separately (p. 428)	.....	.....	General average (p. 473)	General average (p. 455)	.....	Particular average (p. 529)	General average (p. 561)	General average (p. 570)
33.—Wages and keep of crew while detained for the purpose.	.....	Do.	.....	.....	Do.	Do.	.....	.....	Do.	Do.
34.—Expenses of entering a port of refuge, to repair damage to ship caused by accident, or to avoid common peril.	General average (p. 250)	General average (p. 425)	General average, when port entered for repairs (p. 454)	General average (p. 464)	Do.	General average (p. 486)	General average (p. 516)	General average (p. 526)	Do.	General average (p. 563)
35.—Ditto, to repair damage caused by sacrifice for common safety.	Do.	Do.	Do.	Do.	Do.	Do.	Do.	General average (p. 526)	Do.	Do.
36.—Expense of discharging cargo at a port of refuge.	General average, unless sole motive to recondition cargo (pp. 259, 260)	.....	Same as Entland (p. 454)	General average (pp. 459, 464)	.....	Do.	Do.	Do.	General average, when necessary to effect general average repairs, or for common safety (p. 561)	In practice, general average if discharged in an unusual manner (p. 570)
37.—Warehouse rent during stay in port of refuge.	General average, if damage to ship was general average; otherwise special charge on cargo (p. 250)	General average (p. 425)	General average, unless sole motive of discharge is to recondition cargo (p. 454)	Do.	General average (p. 479)	Do.	Do.	Do.	General average, when cargo discharged to effect general average repairs (p. 561)	General average (p. 590)

	ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
31	.....	.....	.....	.....	.....	.....	.....	.....	General average so long as there is one continuous series of operations of operations (see pp. 750—754)	.....	.....
32	General average (p. 600)	.....	.....	.....	.....	General average (p. 656)	.....	.....	Same as Argentine Republic (p. 779)	.....	.....
33	General average (p. 601)	.....	.....	.....	.....	.....	.....	.....	Do.	Do.	.....
34	General average (p. 559)	.....	Not gen. average (p. 622)	Same as Mexico (p. 637)	Not gen. average (p. 647)	General average (p. 655)	General average (p. 682)	Not gen. average by Code, but in practice often adjusted so (p. 664)	General average (p. 755)	Do.	Apparently not general average (p. 784)
35	Do.	.....	.....	.....	Do.	Do.	Do.	Not gen. average by Code, but in practice often adjusted so (pp. 664, 670)	Do.	.....	General average (p. 784)
36	General average, if for general average repairs (p. 600; see also p. 601, note (g)).	.....	Same as Spain (p. 626)	Same as Mexico (p. 637)	(See p. 648)	Do.	General average (p. 683)	Shipowner pays, if to repair ship, cargo-owner, if on account of damage to cargo; divided, if discharge for both reasons (p. 670)	Do.	.....	.....
37	General average, if repairs are general average (p. 600)	(See p. 626)	Do.	Do.	Do.	(See p. 671)	Do.	Same as Argentine Republic (p. 779)	General average, if during gen. average repairs (p. 784)

COMPARATIVE TABLE OF THE LAWS OF GENERAL AVERAGE—continued.

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	UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHILE.	FRANCE.	GERMANY.	GREECE.	HOLLAND.
(d). <i>Expenditures</i> :—										
38.—Cost of reloading cargo, in first case ; in other cases usually special charge is to recondition on freight (p. 250)	General average	.....	General average, unless sole motive of discharge is to recondition cargo (p. 454)	General average (pp. 459, 464)	General average (p. 479)	General average (p. 486)	General average (p. 516)	General average (p. 525)	General average, when cargo discharged to effect general average repairs (p. 561)	.....
39.—Cost of quitting port to continue voyage (outward pilotage and port charges).	Do.	General average (p. 425)	General average (p. 454)	Do.	Do.	Do.	Do.	Do.	General average (p. 561)	General average (p. 568)
40.—Wages and keep of crew during detention in port.	In practice not general average (p. 279)	Do.	Do.	General average (p. 464)	Do.	Do.	Not gen. average if freighted by the voyage (pp. 501, 516)	Do.	General average, when repairs are general average (p. 561)	Do.
41.—Ditto, whilst detained in bearing up for port.	Do.	.....	.....	Not gen. average (p. 464)	.....	.....	.....	Not gen. average (p. 561)	.....	In practice, is general average (p. 569)
42.—Ditto, after leaving port to get back to the same point in the voyage as when she bore up.	Do.	.....	.....	Do.	.....	.....	.....	Do.	.....	.....
43.—Coals and engine stores of steamer expended during above three periods : No. 1 No. 2 No. 3	Do. Do. Do.	..... ..... .....	..... ..... .....	..... ..... .....	..... ..... .....	..... ..... .....	..... Probably gen. average (p. 515) Do.	..... ..... .....	..... ..... .....	..... In practice, gen. average (p. 569)
44.—Loss on sale of cargo at a port of refuge, to raise funds for general average expenditure.	General average (p. 326)	General average (p. 426)	General average (p. 455)	.....	General average (p. 479)	General average (p. 486)	General average (p. 515)	General average (pp. 529, 541)	General average (p. 562)	General average (p. 573)
45.—Temporary repairs of particular average damage to ship at port of refuge.	No ^o gen. average (pp. 264, 268)	.....	General average (p. 454)	.....	.....	.....	.....	Sometimes allowed in practice up to saving of general average expenses (p. 553)	.....	Same as Germany (p. 569)

L.	ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
38	General average, if repairs are general average (p. 600)	.....	.....	.....	.....	General average (p. 655)	General average (p. 693)	.....	General average (p. 755)	.....	.....
39	General average (p. 599)	.....	.....	.....	.....	Do.	Do.	...	Do.	Same as Argentine Republic (p. 779)	Gen. average, if inward charges general average (p. 784)
40	General average, if repairs are general average (p. 600)	.....	Same as Spain (p. 636)	Same as Mexico (p. 637)	.....	Do.	Do.	General average, if ship freighted by month, when detention is for general average repairs, or through <i>force majeure</i> (p. 652)	General average (p. 759)	Do.	General average, during general average repairs (p. 784)
41	.....	.....	.....	.....	...	Not gen. average (p. 654)	Not gen. average (p. 694)	.....	Do.	.....	.....
42	.....	.....	.....	.....	.....	Do.	Do.	.....	Not general average (p. 759)	.....	.....
43	.....	.....	.....	.....	.....	.....	General average (p. 691)	.....	General average (p. 761)	.....	.....
	.....	.....	.....	.....	.....	.....	Not gen. average (p. 691)	...	Do.	.....	.....
	.....	.....	.....	.....	.....	.....	Do.	.....	Not general average (p. 761)	.....	.....
44	General average (p. 602)	.....	General average (p. 623)	Same as Mexico (p. 637)	.....	General average (p. 656)	General average (pp. 691, 695)	General average (p. 662)	General average (p. 762)	Same as Argentine Republic (p. 779)	General average (p. 784)
45	General average (p. 600)	General average, if it saves other general average expenses (p. 694)	General average (p. 741)

COMPARATIVE TABLE OF THE LAWS OF GENERAL AVERAGE—*continued*.

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Part II.—ADJUSTMENT OF GENERAL AVERAGE.	UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHILI.	FRANCE.	GERMANY.	GREECE.	HOLLAND.
(a) <i>Proper Place and Time for Adjustment.</i>										
46. —When ship reaches original port of destination, with her cargo.	Port of destination (p. 291)	Where cargo is delivered or voyage ends (p. 432)	Final port of discharge (p. 455)	The place of the ship's discharge (p. 468)	Port of delivery (p. 482)	Place of charge (pp. 490, 491)	Port of destination (p. 514)	Port of destination (p. 538)	Place of charge (p. 565)	The place where the voyage ends (p. 583) 46
47. —When voyage is justifiably broken up at port of loading.	Port of loading (p. 291)	The port of loading (p. 433)	Port of loading (p. 455)	.....	Port of loading (p. 482)	Port of loading (pp. 490, 491)	The port of loading, unless goods forwarded to destination under original contract (p. 517)	The port of loading (p. 533)	.....	See reply to No. 48. 47
48. —When ship is wrecked or condemned at port of refuge.	Port of refuge, unless goods forwarded to destination under original contract (p. 298)	The place where voyage ended (p. 433)	Port of refuge (p. 455)	.....	.....	Port of refuge, unless cargo carried on in another ship (pp. 490, 491)	Same as England (p. 517)	The place to which the cargo is brought in safety (p. 533)	.....	Where voyage broken up or vessel stranded in Holland, the port of sailing; where voyage broken up or cargo sold at port of refuge, in another country, place of breaking up or sale of cargo (pp. 583, 584) 48
49. —Is the adjustment to be based on the state of facts at the time of the sacrifice or outlay, or at the termination of the adventure?	Sacrifice, end of adventure; outlay, in practice, ditto; in principle, undetermined (pp. 300 <i>et seq.</i>)	For jettison on facts at end of the adventure (p. 435)	.....	.....	.....	.....	For jettison on facts at the termination of the adventure (p. 505)	.....	.....	..... 49

ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
At the place of the ship's discharge (p. 609)	Presumably, place of discharge (p. 615)	Port of discharge, if Mexican, otherwise port of refuge (p. 627)	Same as Mexico (p. 637)	Port of delivery (p. 645)	Presumably at place of discharge (pp. 657, 658)	Where ship and cargo part company, and according to the law in force there (p. 704).	At the port of discharge, if Spanish, otherwise the port of refuge (p. 672)	Port of destination (p. 763)	Same as Argentine Republic (p. 775)	At the place of discharge (p. 786)
.....	.....	Presumably the port of loading (p. 629)	Do.	Presumably the port of loading (p. 644)	.....	The port of loading (p. 704)	Presumably the port of loading (p. 676)	The place of breaking up, when interests separated there (p. 763)	Do.	.....
The port of refuge (p. 609)	.....	See answer to No. 46.	Do.	Presumably where the voyage is broken up, if out of the kingdom (p. 645)	.....	Where ship and cargo part company (p. 704)	See answer to No. 46.	Do.	Do.	.....
.....	.....	Termination of adventure for sacrifices (p. 631)	Do.	.....	.....	.....	Termination of adventure for sacrifices (p. 681)	Undetermined (see pp. 727, 728, 769)	Do.	.....

	UNITED KINGDOM.	ABORNTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHILI.	FRANCE.	GERMANY.	GREECE.	HOLLAND.
(1) <i>Made of computing. Amounts to be made good:—</i>										
50.—For jettison of cargo, when ship and cargo reach original port of destination.	Net market value there at time of arrival (p. 336)	Current price at place of discharge, minus freight, import duties and customary expenses, unless kind or quality stated in bill of lading is inferior (p. 435)	Market price at destination, including freight, (p. 435)	Net value at place of discharge, including freight, unless quality stated in bill of lading is inferior (p. 465)	.....	Market value at port of discharge, less freight, duty and ordinary expenses (p. 491); unless quality stated in bill of lading is inferior (p. 492)	Market value at port of discharge, less charge, duty and cost of discharging saved (p. 504); unless quality stated in bill of lading is inferior (p. 506)	Market price on commencement of discharge at place of destination, less freight, duty and expenses (p. 586); as to deduction of freight, see pp. 586, 588; where kind or quality as stated in bill of lading is inferior, see p. 587	Actual value of goods unless place of destination, less freight, duty and expenses (p. 565)	Market price at port of discharge, deducting charge, deducting expenses (p. 586); as to deduction of freight, see pp. 586, 588; where kind or quality as stated in bill of lading is inferior, see p. 587
51.—When the goods jettisoned were damaged at the time.	Damaged value allowed (p. 357)	.....	.....	.....	.....	.....	.....	Damaged value only allowed (p. 533)	.....	In practice, damaged value only allowed (p. 586)
52.—When, though sound at the time, they must, had they remained on board, have become damaged before arrival.	Do.	.....	.....	.....	.....	.....	.....	Damaged value only allowed, unless sacrifice made good before subsequent accident (pp. 522, 523)	.....	In practice, damaged value only allowed (pp. 563, 571, 586)
53.—When the voyage is justifiably broken up at some other place.	Value at that place allowed (p. 338)	Value at place of interruption to the voyage (p. 439)	.....	.....	.....	Market price where voyage ends (pp. 491, 493, Art. 1107)	Same as England (p. 518)	Value at place of breaking up (p. 538)	.....	Value at place of breaking up (p. 588)
54.—Freight on jettison to be made good.	The amount actually lost through the jettison (p. 339)	Full freight in general average (p. 445)	.....	.....	.....	Its value (p. 493)	.....	The amount actually lost through the jettison (p. 539)	.....	Full freight due from cargo-owner to ship-owner (p. 593)

ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
Net value at port of discharge, unless goods undervalued in bill of lading (p. 608)	Value at time of discharge, deducting expenses made unnecessary by the loss of goods undervalued in bill of lading, &c. (p. 616)	Generally their value at port of discharge. (p. 629)	Same as Mexico (p. 637)	Value at port of discharge, deducting freight, customs and other charges, unless the goods are undervalued in bills of lading. (p. 644)	Market price at port of destination, or where voyage ends. Deduction of freight and other charges if saved by the jettison (p. 658)	Market price at port of destination at time of ship's arrival, deducting freight, customs, and charges saved (p. 700)	Generally their value at port of discharge (p. 677)	Market value at port of destination on last day of discharge (p. 707)	Same as Argentine Republic (p. 779)	(generally market price at place of discharge; but see p. 786)
.....	.....	.....	.....	.....	Only damaged value allowed (p. 658)	The damaged value only allowable with deductions, as above (p. 701)	.....	Deduction must be made (p. 767)	.....	.....
.....	.....	.....	.....	.....	.....	Either no compensation in general average on the amount to be lessened fairly in proportion to the damage (p. 702)	.....	See above (p. 767) ...	.....	.....
.....	.....	.....	.....	Presumably, value of the goods at the place of breaking up (p. 645)	Market price where the voyage ends (p. 658)	The market price at the place where the voyage ends, deducting as above (p. 700)	.....	Value at place of breaking up, if interests are separated there (see p. 763)	Same as Argentine Republic (p. 779)	.....
.....	Full freight (p. 620)	Freight <i>pro rata</i> for distance covered at time of jettison (p. 633)	The full freight (p. 650)	Full freight (p. 658)	Full freight, deducting special charges saved (p. 701)	Freight <i>pro rata</i> for distance covered at time of jettison (p. 684)	The net amount actually lost (p. 768)	Do.

COMPARATIVE TABLE OF THE LAWS OF GENERAL AVERAGE—continued.

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	UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHILI.	FRANCE.	GERMANY.	GREECE.	HOLLAND.
(b) <i>Modes of computing amounts to be made good:—</i>										
55.—For sacrifices of ship's materials: in wooden ships.	Cost of repairs, less one-third, "new for old," with certain exceptions (p. 341)	.....	Cost of repairs, less one-third; no deduction for first year, nor from cost of anchors, &c. (p. 455)	Deduction of one-third; anchors allowed in full; steel or copper wire hawsers and chains, 15 per cent. deducted (p. 461)	.....	Estimated value at time of average (p. 492)	Cost of repairs, less one-third from wooden materials, and one-sixth from iron materials, except on first voyage (p. 516)	Estimated cost (or actual cost, if less), less deductions "new for old." No deduction for the first year (p. 531)	.....	See pp. 581, 582, 55
56.—For sacrifices of ship's materials: in iron ships.	Cost of repairs, less deductions detailed (pp. 346, 347)	.....	.....	Same as wood (p. 461)	.....	Estimated value at time of average (p. 492)	Same as wood (p. 516)	Same as wood (p. 531)	.....	See pp. 581, 582, 56
(c) <i>Contributing Interests and Values:—</i>										
57.—Ship contributes on ...	Its actual value to the owner at the time when it ought to contribute (see No. 49, <i>supra</i>)	Its value on arrival, including compensation in general average (p. 434)	One-half its value, plus one-half of any amount made good (p. 456)	Its value at the place of discharge (p. 466)	Actual value at port of discharge (p. 482)	Actual value at port of discharge (pp. 487, 492)	One-half of its value, less cost of repairs effected during voyage (pp. 500, 505)	Its value at end of voyage on commencement of discharge, less cost of repairs effected subsequent to general average (p. 533)	One-half its value at place of unloading of unloading (p. 564)	Where voyage completed, its value in the condition in which it arrives, adding compensation by general average (p. 584)
58.—Cargo contributes on...	Net market value at port of destination, or at place where voyage broken up (p. 353)	Net value at destination, or at port of shipment, or re-ment, if voyage broken up (p. 434), unless kind or quality stated in bill of lading is superior (p. 435)	Net value where ship and cargo separate (p. 455)	Net value at place of discharge, deduction freight to be paid (p. 465), unless quality stated in bill of lading is superior (p. 466)	Value at port of delivery, or where adjustment made, at port of loading, plus shipping charges (p. 482)	Net value at port of discharge, (see Art. 1107), including value of goods sold for ship's requirements (p. 482), where adjustment at port of loading, market price at time of loading, plus shipping charges, unless quality stated in bill of lading is superior (pp. 487, 492)	Market value at port of destination, less freight and charges saved (p. 500), unless quality stated in bill of lading is superior (p. 505)	Market price at place of adjustment, less freight, and other charges (p. 534)	Net value at place of unloading, unless goods' over-value in bill of lading (p. 564)	Where voyage completed, its value at place of discharge, deduction freight, expenses of unloading, and particular where voyage broken up short of destination, see pp. 585-586. If goods are of lower quality than stated in bill of lading, they contribute on quality stated (p. 587)

ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
Cost of repairs, less one-third, unless on first voyage; and anchors or chains less one-sixth; special deductions for copper sheathing (p. 598)	.....	Market value, deducting one-third new for old. This rebate not made on anchors or chains (p. 630)	Same as Mexico (p. 637)	.....	Full cost of repairs to ship if not a year at sea. Also for ship's furniture, if sacrificed on first voyage. In other cases a third is deducted; for anchors, nothing; for chains, one-sixth (p. 658)	To be made good in full if the ship had not been two years at sea. Later, one-third is deducted (p. 700)	Valued at price current, deducting one-third new for old. This rebate not made on anchors and chains (p. 677)	Generally, one-third new for old; see the deduction being also made from dock expenses, &c. (p. 765)	.....	.....
See above .....	.....	See above .....	.....	.....	See above	See p. 680	See above	See above (p. 768) ...	.....	.....
Its half value at place of discharge, deducting particular average (pp. 605, 608)	Its value at time and place of arrival (p. 615)	Its actual value in the state in which it is found (p. 630)	Same as Mexico (p. 637)	One-half its value at place of discharge (pp. 639, 643). For practice, see p. 652	Its value in damaged condition (pp. 654, 657)	Its actual value where the voyage ends—deducting improved value prior to repairs, adding compensation for repairs not yet effected (p. 702)	Its actual value in the state in which it is found (p. 678)	Its value on arrival at place of discharge, deducting repairs (p. 770)	Same as Argentine Republic (p. 779)	One-half its value at place of discharge, deducting salvage (p. 786)
Net value at place of discharge (p. 605), unless goods over-landed in bill of lading (p. 608)	Value at time and place of discharge, deducting freight and expenses which, in case of loss, need not be paid, unless goods over-landed in bill of lading (p. 616)	Actual value at place of discharge, deducting freight, insurance, and landing charges (p. 629)	Do.	Value at place of discharge, deducting freight, insurance, and landing charges, unless goods over-landed in bill of lading (p. 644)	Net value at place of discharge (p. 658)	Market value at port of destination, or place where voyage ends, deducting freight, commissions, and other charges saved (p. 708)	Actual value at port of discharge, deducting freight, insurance, and unloading charges (p. 676)	Generally, market value on last day of discharge, less freight and charges (p. 770)	Do.	Generally, value at place of discharge (but see p. 784)

COMPARATIVE TABLE OF THE LAWS OF GENERAL AVERAGE—continued.

	UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHILI.	FRANCE.	GERMANY.	GREECE.	HOLLAND.
(c) <i>Contributing Interests and Values:—</i>										
59.—Freight contributes on	Gross amount earned, less expenses incurred after general average (pp. 354, 372)	Its amount, deducting wages and maintenance of crew (p. 434)	One-half of the gross amount earned, including freight advanced and freight on goods sacrificed (p. 459)	One-half of gross amount (p. 465)	One-half its amount (p. 482)	Freight on goods earned and on goods sacrificed, and passage-money, less wages and maintenance of crew (p. 457)	One-half of the gross amount (pp. 500, 505)	Two-thirds of the gross amount earned and two-thirds of the amount compensated in general average (p. 535)	.....	Its amount, deducting wages and provisions of crew (p. 555)
60.—When freight is absolutely prepaid, its share of general average is payable by	The person making the advance (pp. 354, 389)	.....	Presumably the shipowner (p. 456)	.....	.....	.....	Undetermined (p. 500)	The charterer (p. 557)	Owner of cargo (p. 564)	The charterer (p. 584)
61.—Amount made good for sacrifices contributes to	All gen. average on voyage (p. 336)	General average (p. 434)	.....	.....	General average (p. 452)	.....	All gen. average (p. 508)	All general average on voyage, subject to exemption if claim for jettison is waived (p. 535)	.....	.....
62.—Exempt from contribution are	Crew's wages and effects, and generally, in practice, passengers' effects and the mails (pp. 375 <i>et seq.</i>)	Ammunition, provisions, and personal effects of captain, crew and passengers (p. 436)	Provisions, ammunition, and wages and effects of crew (p. 456)	Munitions of war and victuals, effects of crew, and baggage of passengers (p. 465)	Ship's provisions, passengers and crew, and articles recovered by divers (p. 482)	Ammunition, provisions, personal effects of crew and passengers (p. 488)	Ammunition, provisions, personal effects of crew, and passengers' baggage and mails (p. 506)	Ammunition and victuals; wages and effects of crew; passengers' baggage (p. 536)	Provisions, and clothes, and baggage of crew and passengers (p. 563)	Provision-wear, ing apparel, and ammunition (p. 587)
(d) <i>Remedies for General Average:—</i>										
63.—Lien, or equivalent remedy <i>in rem</i> , is given to	The shipowner (p. 384), and perhaps in a qualified sense, against foreign-owned ships, the owner of cargo (p. 409)	The shipowner (p. 444)	.....	The shipowner (p. 467)	The shipowner (p. 482)	The shipowner (p. 494)	The shipowner (p. 508)	The shipowner (p. 537) and cargo-owner (p. 539)	The shipowner (p. 565)	The shipowner (p. 594)

ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
59 Its half value of gross amount (p. 605)	One-half its amount (p. 615)	50 per cent. (p. 631)	Same as Mexico (p. 637)	One-half its amount, deducting expenses which would have been saved in case of loss (pp. 639, 640. For practice, see p. 652)	Half the gross amount (pp. 634, 638)	Half the amount earned and half the compensation in general average (p. 703)	Fifty per cent. (p. 678)	One-half in some States, two-thirds in others (p. 771)	Same as Argentine Republic (p. 779)	One-half (p. 786)
60 Cargo-owner, and is not deducted from value of cargo (p. 608)	.....	.....	.....	.....	.....	The owner of cargo (p. 704)	.....	The cargo-owner in the value of the goods (p. 772)	.....	.....
61 General average (p. 606)	General average (p. 615)	Things jettisoned do not contribute to subsequent general average (p. 630)	Same as Mexico (p. 637)	All gen. average (pp. 640, 645). Whole amount made good for sacrifices of ship and freight contributed in practice (p. 652)	.....	.....	Things jettisoned do not contribute to subsequent general average (p. 678)	All general average (p. 773)	Same as Argentine Republic (p. 779)	Goods jettisoned continue to general average, but not to subsequent damage to other goods (pp. 786, 787)
62 Personal effects of crew and passengers (p. 606)	Armament of ship, provisions, wages of crew, clothing of passengers and crew (p. 615)	Ammunition, provisions, and personal effects (p. 630)	Do.	Ammunition, provisions, wages and effects of seamen, personal effects and baggage of passengers (p. 640)	.....	Provisions, coal, and engine stores, ammunition, wages of captain and crew. The clothes of those on board (p. 704)	Ammunition, victuals, clothes of crew and passengers (p. 678)	Passengers' baggage not in use liable to contribute. In other respects same as England	Do.	Ammunition, provisions, wages, and personal effects of captain and crew (p. 784)
63	The shipowner (p. 619)	The shipowner (p. 632)	Do.	The shipowner (p. 651)	The shipowner (p. 657)	Both shipowner and cargo-owner (p. 706)	The shipowner (pp. 682, 685)	Both shipowner and owner of cargo (p. 773)	Do.	The shipowner (p. 787)

COMPARATIVE TABLE OF (PART) LAWS OF AFFREIGHTMENT.

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	UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM.	BRAZIL.	CHIL.	FRANCE.	GERMANY.	GREECE.	HOLLAND.
Part II.—LAW OF AFFREIGHTMENT.										
64.—The shipper of cargo may take back his goods during the voyage, on the terms of	Paying full freight, unless adventure terminated by agreement, when <i>pro rata</i> stowing and re-stowing freight may be due	Paying full freight, demurrage, general average, and costs of unloading, stowing and re-stowing (p. 447)	.....	Paying full freight and all displacement charges (p. 474)	.....	.....	Paying full freight and all displacement charges (p. 509)	Paying full freight and all freight and charges (p. 543)	.....	Paying full freight, general average, if any, and cost of displacement (p. 591)
65.—Otherwise, if the captain is obliged to repair the ship during the voyage, the shipper or owner of cargo is	Bound to wait until ship is repaired	Bound to wait (p. 447)	.....	Bound to wait or pay freight in full (p. 474)	.....	.....	Bound to wait or pay freight in full (p. 509)	Bound to wait or pay full freight (p. 563)	Bound to wait or pay full freight (p. 563)	Bound to wait (p. 591)
66.—If the ship cannot be repaired, the captain is	Entitled, but not bound, to forward goods in another ship, in case of and claim original freight.	Bound to hire another without claiming freight (p. 447)	.....	Bound to hire another (p. 474)	.....	.....	Bound to hire another ship if he can (p. 509)	Bound to forward goods (p. 544)	.....	Bound to hire another without claiming more freight (p. 592)
67.—If no other ship can be hired	Shipowner loses freight	Distance-freight due (p. 447)	.....	No freight due (p. 475)	.....	.....	Freight is due <i>pro rata itineris</i> (p. 509)	Freight is due <i>pro rata</i> , not to exceed value of goods (p. 543)	.....	No further freight than in proportion to distance run (p. 592)
68.—In that case, the captain's duty with regard to the goods is	To inform shippers, and await instructions	To warehouse cargo (p. 447)	.....	.....	.....	.....	.....	To store and sell them (p. 544)	.....	To inform shippers and carry out necessary measures for safety of goods (p. 592)
69.—If goods are saved from shipwreck, by or under the orders of the captain	Full freight under the contract is due, if the goods reach their destination, otherwise none	<i>Pro rata</i> freight, or full freight, if captain brings goods to destination (p. 449)	.....	.....	.....	.....	Freight is due in any case up to the place of shipwreck, and full freight if the captain forwards the goods to their destination (p. 510)	<i>Pro rata</i> freight is due (p. 543)	.....	If goods forwarded to destination, full freight due; if not, <i>pro rata</i> freight only due (p. 594)

ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
64	Paying full freight and freight, general displacement average, &c., if charges (p. 611) incurred, and damage arising from discharge (p. 618)	Paying full freight, expenses of delay and losses of other shippers (p. 635)	.....	Paying full freight, general average (p. 651)	.....	.....	Paying full freight, expenses of putting in, and losses of other shippers (p. 687)	Paying freight and general average charges	.....	.....
65	Bound to wait or pay freight in full (p. 612)	Bound to wait (p. 635)	.....	..	.....	.....	Bound to wait (p. 687)	.....	.....	.....
66	Entitled to <i>pro rata</i> freight (p. 612)	Bound to charter another ship on his own account (p. 652)	.....	..	Authorized to hire another ship (p. 659)	Bound to forward goods, or warehouse or sell them (p. 710)	Bound to charter another ship on his own account (p. 689)	Bound to forward cargo to destination, cost payable out of original freight, and balance, if any, by cargo	.....	.....
67	.....	Distance-freight due (p. 633)	.....	Distance-freight only due (p. 649)	.....	.....	Distance-freight due (p. 683)	Distance-freight Shipowner loses freight	.....	.....
68	.....	To warehouse them and inform shippers (p. 633)	.....	.....	.....	.....	To warehouse them and inform shippers (p. 683)	To warehouse cargo owner's instructions	.....	.....
69	<i>Pro rata</i> freight, or full freight if forwarded by captain (p. 613)	<i>Pro rata</i> freight in any case (p. 633)	.....	.....	.....	..	<i>Pro rata</i> freight, in any case (p. 684)	Same as England ...	.....	.....

	UNITED KINGDOM.	ARGENTINE REPUBLIC.	AUSTRIA.	BELGIUM	BRAZIL.	CHILE.	FRANCE.	GERMANY.	GREECE.	HOLLAND.
70. —If, after shipwreck, goods are picked up at sea or along the coast, without the crew's or master's intervention.	No freight due	No freight due (p. 449)	.....	...	.....	.....	Freight is due up to the place of shipwreck (p. 510)	....	.....	No freight due (p. 594) 70
71. —If, after ship has been abandoned at sea by her master and crew, she is picked up and carried with her cargo to her destination by salvors	No freight due (<i>Cito</i> p. 214)	.....	...	.....	.....	.....	.....	.....	.....	..... 71
72. —If the ship is able to carry the goods but they, being sea-damaged, are necessarily sold at a port of refuge by the captain's order—	No freight due	.....	.....	.....	.....	.....	Full freight due (p. 509) due (p. 510)	Full freight is due (p. 557)	.....	If whole cargo sold, <i>pro rata</i> freight due; if only part sold, full freight due when ship completes voyage, but only <i>pro rata</i> freight in event of her loss (p. 592) Same as France (p. 594) 72
73. —When goods arrive at their port of destination so damaged as not to be worth the freight—	Full freight, if goods delivered in specie	Full freight, unless more than half the contents have leaked away (p. 449)	.....	Same as France (p. 473)	..	.....	Full freight, except when casks of liquids are nearly empty (p. 511)	Full freight is Same as France (p. 543)	... ..	..... 73

ITALY.	JAPAN.	MEXICO.	PERU.	PORTUGAL.	RUSSIA.	SCANDINAVIA.	SPAIN.	UNITED STATES OF AMERICA.	URUGUAY.	VENEZUELA.
.....	No freight due .....	.....	...
.....	Do.	.....	.....
Full freight is due (p. 612)	Full freight due, less expenses saved (p. 650)	.....	.....	.....	Do.	.....	.....
Same as France (p. 614)	Full freight is apparently due, except for receptacles of liquids which are delivered with not more than one-fourth of contents remaining (p. 635)	.....	Full freight, unless half has leaked away (p. 652)	.....	Full freight due, except when receptacles of liquids are delivered more than half empty (p. 712)	Full freight, except when three-quarters of casks of liquids have leaked away (pp. 685, 688)	Same as England	.....	.....



ADDENDUM.

The following note, sent to the editors by Mr. W. R. Coe, to be inserted in Appendix V. at the end of the discussion on substituted expenses (*post*, pp. 756—759), reached them too late for inclusion in the body of the work:—

“Since the foregoing was written,” he says, “a decision in the United States District Court at Philadelphia involving the question has been reported, *Shoe v. Craig*, 189 Fed. 227.

“The schooner *Matilda T. Borda*, while on a voyage from Fernandina to Philadelphia, sustained damage to her rudder during heavy weather and sprang a leak; she put in to Charleston, and from there was towed to destination. The arrangement for towing the vessel to destination was made by the managing owner without any conference with the owners of the cargo. The vessel and cargo were both owned in Philadelphia.

“The Court found that it was impossible to make the necessary repairs at Charleston, but that the vessel could have been repaired at Savannah, about ninety miles distant, and decided that the towage was not general average on the ground that the evidence showed that the master and managing owner were acting solely in the interest of the freight, and, further, that under the circumstances of the case the cargo interests should have been consulted.

“In the opinion, McPherson, J., made the following remarks:—

“(2) Of course the cost of towage from Charleston to Philadelphia would not in any event be a general average charge, strictly so called, but in a proper case it might be what is known as “a substituted expense.” . . .

“The tendency is, apparently, toward the allowance of substituted expenses, but the subject needs cautious treatment. In the existing condition of the law, I do not believe that a substituted expense is ever allowable in general average unless all parties in interest have first

agreed to it. The master's power to bind all interests may properly support such charges, if he has acted in good faith and without the opportunity of consulting those who may be affected by his act. It may easily be impracticable to confer with all the consignees of a general cargo, for example; and circumstances may also be such that he must act promptly on his own judgment without consulting any interest—either ship, freight, or cargo; but in these days of easy communication by telegraph and telephone, there is usually no difficulty about consultation, and where this is true I think good faith requires, *primâ facie* at least, that notice should be given. In such a situation, the lack of any effort to communicate may well furnish ground for the inference that the course actually taken was intended to advance a particular interest, and not the interest of all. In the present case I think this inference should be drawn. As already stated, the course adopted by the master (which was evidently dictated by the managing owner) seems to have been taken in the interest of the freight alone, and therefore the cost cannot be brought into general average.'

"I see nothing in this decision to cause me to change the views above expressed on this subject, and on the particular facts of the case before the Court its conclusions were undoubtedly correct.

"In the present state of the law the decision points to the advisability of obtaining the agreement of the interested parties before adopting a substituted course."

GENERAL AVERAGE.

INTRODUCTION.

THE law of General Average is built upon or around a small fragment of ancient Greek legislation, which forms the text for a chapter in the Digest of Justinian: "*Lege Rhodiâ cavetur ut si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarcitur quod pro omnibus datum est.*" The Rhodian law provides that if in order to lighten a ship merchandize is thrown overboard, that which has been given for all shall be replaced by the contribution of all. In this short sentence we have the principle, and a perfect example, of the peculiar communism to which seafaring men are brought in extremities. What is given, or sacrificed, in time of danger, for the sake of all, is to be replaced by a general contribution on the part of all who have been thereby brought to safety. This is a rule which from the oldest times of which we have a record has been universal amongst seafaring men, no matter to what country they belong, being obviously founded on the necessities of their position.

"While the Phœnicians and the Carthaginians," says M. Pardessus (*a*), "were making a commerce truly The Rhodians.

(*a*) 1 Pard. Intr. xxvi., xxvii.

universal, a career less vast, but yet not without importance, was opening itself to the navigation of the Greeks, and especially"—for Greece itself was late in entering upon the field—"the Greek colonies in Asia Minor and the adjacent islands. These, surrounded by fertile lands, intersected with bays and rivers, not far off from one another, and yet very diversified in their agricultural products, early profited by the facilities their position gave them, to exchange their commodities, and to carry them into Phœnicia, which was a sort of *entrepôt*." Thus sprung up a commerce, which appears to have been of some importance, though, perhaps, not extending very far beyond the limits of the Ægean Sea. Rhodes is one of the cities decorated by the title of "mistress of the sea." In the Punic wars, we learn from Polybius, Rhodes took the Roman side, and did good service in attacking the war-vessels of the Carthaginians,—as cruisers perhaps (*b*). Cicero says of the Rhodians that they were a people whose naval power and discipline remained even to times within his own memory (*c*). Pardessus considers it probable that the Rhodians borrowed their maritime laws from the Phœnicians, though he hardly offers any particular reasons for the conjecture (*d*).

To be able to say, indeed, that Greeks from Rhodes were the first to express the principle of general average in words, and so give it currency, throws very little light on its true origin. It must have been already very ancient and very widespread as a practice before it became so neatly formulated. We must constantly remember that in the old times, for perhaps thousands of years, the merchants or owners of cargo used, almost

(*b*) Park, Ins. Intr. xlvii.

(*c*) Pro leg. Manil. c. 13.

(*d*) 1 Pard. Intr. xxix.

of course, to sail with their wares from port to port like pedlars. In these little vessels, mostly navigating the Mediterranean or Ægean Sea, where storms quickly spring up and subside, occasions would be frequent where shipwreck could only be averted by lightening the ship of portions of her cargo, a measure which, however beneficial to the rest, might to one man on board mean ruin. His consent to such a sacrifice could only be bought by a promise—first express, then customary and taken for granted—that when, or if, the ship came safe to shore, all who had profited by his loss would pay their share to make it good.

The Romans, the great improvers of other people's The Romans. inventions, have given us a good specimen of their work in this kind, in the chapter of the Digest headed *De Lege Rhodiâ de Jactu*. The sentence above quoted takes the place of honour, as a sort of text, and is followed by a fragmentary collection of short judgments or opinions, some of them named as the dicta of Servius, Ofilius, Labeo, or other eminent juriconsults of the time. It is not easy to trace the principle of arrangement, unless it be, first, to show by examples (such as the cutting away of a mast) that the case of throwing cargo overboard is only to be treated as an illustration of some more general principle; secondly, to establish that this rule of contribution is to be taken in due correlation with the rights of property, by severely restricting it to such sea-losses as flow from a voluntary sacrifice for the sake of all, leaving every loss, whether of ship or cargo, which is the result of pure accident, to lie where it falls; and, thirdly, when these two points are made clear, to determine some of the more complicated questions which arise in carrying the principle consistently into operation (*e*).

(*e*) See Appendix A.

Decay of
Roman law.

After the fall of the Roman Empire, its laws, as we know, in the deep barbarism that ensued, fell into almost absolute forgetfulness. They were of course no longer operative as laws. The language they were written in became more and more strange in Europe as the continent grew to be overrun with barbarians. That which had once been boasted to be the code of law for the whole civilized world was by degrees so neglected that it has been doubted by scholars, says Pardessus, whether there existed in Europe a single copy of the Pandects at the time when the Pisans, about A.D. 1135, discovered one on the conquest of Amalfi (*f*).

Survival as
tradition.

In the recollection of seafaring men, however, or as tradition, or as a rule commending itself on account of its utility, the outlines of this chapter *de jactu* retained a hold, in some degree, over the seafaring population of Europe, and were reproduced, in a simpler and ruder form, in the several collections of sea laws which belong to a later period. The more elaborate provisions of the Digest disappeared, but after a long interval were republished, and under another name reassumed their authority.

The Rolls of
Oleron.

Of the codes or collections of customs here spoken of, perhaps the most important, as that which had the most extended authority, is one called the Rolls or Judgments of Oleron. Their origin is lost in obscurity: but from internal evidence we may conclude that they were a collection of judgments, probably delivered in some court of Bordeaux, and having reference to the commerce in wine which had its centre in that city.

(*f*) 1 Pard. 140. "Criticism," says Gibbon, "has pronounced that all the editions and manuscripts of the West are derived from one ori-

ginal"—meaning, he tells us, this Amalfitan copy. (Decl. and Fall, chap. 44.)

Selden tells us that these Rolls were revised by our King Richard I. on his return from the Holy Land during his stay at the Isle of Oleron, and were declared to be the law of the sea, under the title of *la ley Olyroun* (*g*). Be that as it may, what is certain is that, for some reason or other, these judgments obtained, and held for some centuries, over the greater part of Europe, a very considerable authority. They were copied into the Black Book of our Admiralty (*h*). By an English Act of Parliament of the year 1402 (so M. Pardessus informs us), our Admiralty Court was directed to govern its decisions exclusively by the laws of Oleron and the common law of England (*i*). The old laws of Flanders (*k*), of Catalonia (*l*), of Genoa (*m*), and of Holland (*n*), in like manner contain clauses literally copied from the judgments of Oleron.

These judgments consist of fifty-six articles or short sentences, of which the first thirty-five are distinguished by each ending with the words, “*c’est le jugement en ce cas* ;” and the others with the words “*c’est le jugement*.” The latter are supposed to be a later addition. The only introductory description or title is “*c’est la copie des Roules de Oleron et des jugemens de mer*.” They consist of a series of short sentences or regulations, thrown together without any obvious order, and giving directions for the conduct of business by sea ; as, how the master must not sell his ship unless by consent of the co-owners ; but, if he is away from the home port, at

(*g*) Selden, *Mare Clausum*, lib. 2, cap. 24 ; 1 Pard. 289.

(*h*) 1 Pard. 309 ; Twiss’s *Black Book*, p. 97.

(*i*) “*Et auxi les dites admirelles usent leurs leys soulement par la ley de Oleron et ancienne ley de la mer et*

par la ley d’Angleterre et ne mye par custum ne par nul autre manere.” 4 Hen. 4 ; 4 Pard. 197.

(*k*) 1 Pard. 375.

(*l*) 5 Pard. 362.

(*m*) 4 Pard. 521.

(*n*) 1 Pard. 406.

Bordeaux or la Rochelle, or any other place, and is freighted for a foreign port, and in need of money for the ship's service, he may pledge the ship's apparel to raise it (*o*); how in determining whether the weather is fit for him to put to sea, he is to be guided by the opinion of the majority of those on board, or if he does otherwise shall himself be answerable for a loss; how if a ship is wrecked on any coast, the mariners are bound to save whatever they can of the ship's apparel and the cargo; and how, if they do, he is to pay them a reasonable salary, and their expenses home, so far as the value of the things saved shall extend, and these he may put in pledge to raise funds for the purpose (*p*); rules for avoiding or punishing collisions at sea, with many other regulations of a like nature. They form, in short, a sort of "Body of Sea Law."

Rules for
contribution
to jettison.

Concerning our present subject, all that is said in the Rolls of Oleron is the following:—

ART. 8. "A ship leaves Bordeaux or elsewhere, and it happens that a storm takes it at sea and the ship cannot escape without throwing out goods from within. The master is bound to say to the merchants: 'Signors, we cannot escape without throwing out the wines and the goods.' The merchants, if there are any, shall signify their good will who shall agree to this jettison, and that the master's reasons are most clear; and if they do not agree, the master ought, nevertheless, not to fear to throw out as much as shall seem to him good, swearing himself and the third of his crew on the Holy Gospels, when he shall have come safe ashore, that he did it of no malice, but to save their lives, the ship, the goods, and the wines. Those which have been thrown out ought to be appraised at the rate of those which shall come safe, and shall be divided pound by pound amongst the merchants; and the master ought to share on account of the ship or his freight, at his choice, to restore the damage. The mariners ought

to have each a ton (*tonnel*) free, and the rest shall contribute to the jettison according to what he has, if he defends himself on the sea like a man; and if he does not defend himself, he shall have nothing free: and the master shall be believed upon his oath. And this is the judgment in this case" (*q*).

ART. 9. "It occurs that the master of a ship must cut away his mast by force of tempest; he ought to call the merchants and show them that it is fitting to cut the mast to save the ship and the wares; and sometimes it occurs that one cuts cables and the anchors to save the ship and the wares. These ought to be counted pound by pound like jettison; and the merchants ought to share and pay without delay, before their goods are put out of the ship; and if the ship was held fast (*en dur siege*) and the master was delayed by their debate, and there was collusion, the master ought not to suffer, but he ought to have his freight on those wines as he will take for the others. And this is the judgment in this case" (*r*).

Case of mast cut away.

ART. 35. "It is ordered and established for custom of

What shall contribute.

(*q*) *Laws of Oleron, Art. 8; 1 Pard. 328. In explanation of this franchise allowed to the sailors, it may be mentioned that by Art. 31, those seamen who have agreed to be paid as wages a certain proportion of the freight shall each be allowed one ton free of freight. This ton was likewise, it appears, free of contribution to average if its owner behaved well.

The original of this clause, given by Pardessus, is as follows:—Art. 8. "Une nef s'enpart de Burdeux ou d'aillours, et avient que turment la prent en meer et qu'il ne poet eschaper sans jettre hors les darrées de dedans; le mestre est tenu dire as marchantz: Seignors, nous ne pouvons eschaper sans jettre des vins et des darrées. Les marchantz, si en y a, repondront leur volenté qui agréeront bien de ce gietement si que les resons du mestre sont les plus cleres; et s'ils ne gréent mye, le mestre ne doit pas

lesser pur a qu'il n'en guicte tant qu'il verra que bien soit, jurant soi tiers de ses compaignons sur les saints Evangelies, quant sera venu à saufveté à terre, qu'il nel faisoit de nul malice, mès pur sauver leurs corps, la neef et les darrées et les vyns. Ceux qui seront gietés hors diebvent estre apprises à fur de ceux qui seront venus en saufveté et seront partis livre par livre entre les marchantz; et y doit partir le mestre à compter la neef ou son fret à son choix pour restorer le damage. Les mariners deibvent avoir chascun un tonnel francz, et l'autre doit partir au giet solonc ce qu'il avera, s'il se defend en la meer come un home; et s'il ne se defend mye, il n'aura rienz de franchise; et sera le mestre creu par son serment. Et ce est le juggement en ce cas."

(*r*) Rolls of Oleron, Art. 9: 1 Pard. 329.

the sea that, when it occurs that one makes jettison from a ship, it is well written at Rome that all the merchandize and effects contained in the ship should share in the jettison, pound for pound; and if there are cups of silver more than one in the ship, they ought to contribute to the jettison [*ou faire gré*], and one cup also, if it is not borne at table for the service of the mariners; robes and linen if they are not yet cut, or have not yet been worn, all shall contribute to the jettison. And this is the judgment in this case" (*s*).

Other old
sea laws of
Europe.

Most of the other old sea-laws of Europe,—such as the law of Wisbuy, which tradition ascribes to a sort of convention of mariners and merchants from all parts of Europe, meeting on occasion of some great fair or mart at Wisbuy in the Baltic; the Laws of Amsterdam, of the Hanseatic League, of Flanders, of Genoa, and Catalonia,—either set forth literal translations of these two sentences, or reproduce with less dramatic vivacity rules substantially the same. Everywhere jettison and the cutting away of a mast and slipping a cable are the first examples of a general contribution; to which are gradually added, in later codes, some instances of extraordinary expenditures for the common safety, such as the expense incurred in lightening a stranded ship (*t*).

(*s*) 1 Pard. 329. This article is No. 32 in the manuscript of the English Admiralty. It is not found in any other copy, printed or MS. (1 Pard. 329, n. 1.)

(*t*) The law of Wisbuy provides for the case of jettison (1 Pard. 466, 469), and cutting away a mast (ib. 470); and again (ib. 475-7), for these cases, and for cutting a cable or abandoning an anchor to save the ship and cargo. This code appears to have been formed by gradual accretion: the date of our copy is A.D. 1505; so that no doubt the latter clause is more modern than the

former. The customs of Amsterdam, Enchuysen, and Stavern, date probably the middle of the 15th century, name the cases of jettison (ib. 406), and of cutting a mast or cable, or anything else to save the ship and cargo. (Ib. 408.)

The Regulations of the Hanseatic League, in 1447, have a law concerning jettison, not however as to contribution, but ordering a survey on the ship, on arrival, to verify the fact of jettison, and to see that it was not caused by overloading. (2 Pard. 485.) The Regulation of 1614 provides for jettison and the cutting

It will be observed that in the judgments of Oleron, as in all the sea-laws of modern Europe which adopted and developed those judgments, the idea which lies at the foundation of this contribution is that of a bargain or agreement made between the captain and the owners of the cargo at the moment of danger; on the part of the latter a consent to part with their goods, on the part of the former, and likewise of the latter as amongst themselves, an undertaking to make rateable compensation in case safety shall be attained. Of this idea there is no trace in the Roman law, the terms of which would rather lead us to suppose that the rule was laid down as obligatory on grounds of natural equity.

Idea of
bargain made
on the spot.

The reader who may feel a desire to trace the gradual development of the law of general average from these simple beginnings, will find ample materials in the learned pages of Pardessus. In order to form an intelligible notion of the manner of its growth, it is necessary, as Mr. Maclachlan has pointed out, to consider what is reduced to writing as laws or rules, in due subordination to the living body of custom, of which, in its salient features, the former is a tardy and imperfect record. We

away of masts, just as in the other codes, and adds two curious regulations, one as to the valuing of the ship, and the other dealing apparently with the case of goods fished up from a jettison and more or less damaged. (Ib. pp. 548-9.) With regard to the law of Flanders, it appears that the judgments of Damme, or laws of Westcapelle, which we find often quoted, are nothing more than a translation of a portion of the laws of Oleron. (See 4 Pard. 2.) A statute of Genoa, A.D. 1341, speaks incidentally of jettison and the making it good (ib. 464); and in a later clause we find the word "average": "*si*

contigerit navem aliquod jactum facere . . . vel facere avarias vel expensas aliquas . . . ille jactus vel avariae emendentur per soldum et libram de re que erit in ipsa navi vel ligno et de valuta ipsius navis vel ligni." (Ib. 521.) The Ordinance of Catalonia (A.D. 1340) directs that no jettison of cargo shall be made without the consent of at least the larger part of the representatives of cargo present (5 Pard. 362); and gives several rules for adjusting the loss, particularly that the cargo below the deck shall not be called on to contribute towards the jettison of goods carried on deck. (Art. 32: 5 Pard. 361.)

are to bear in mind that seafaring men have always, and probably in ancient times far more than now, formed a sort of commonwealth of their own, regulated by their own laws and usages, cosmopolitan and intolerant of change, as Pardessus says, to an extraordinary degree (*u*); sociable amongst themselves independently of nationality, and only feeling as foreigners in the company of landsmen. Their great opportunities for framing new rules, or for giving the sanction of authority to rules or collections of rules that might require it, were such assemblages of seafaring men, merchants and mariners, as occasionally took place, for example, at Rome, when the commerce of the world was centered in supplying the wants of the city (*x*); or during the Crusades, which called forth a transport and sutlery service on a vast scale; or at such great fairs or marts, frequented by the ships of all nations, as that of Wisbuy in the Baltic. What was settled at such gatherings, whether carried away in memory or drawn up in the shape of written rules, was naturally regarded as of peculiar authority; and thus there grew up by degrees a body of common law or practice of the seas, apart from, yet recognized by, the several municipal courts of Europe.

In the growth of this law, so far as reduced to writing, there are three distinct stages; the Roman law, which may be regarded as a development of the Rhodian principle by scientific lawyers; the earlier codes of modern Europe, such as the laws of Oleron and the others I have mentioned, in which we see a re-discovery,

(*u*) "Immutability, as well as uniformity, is almost of the essence of maritime legislation." (1 Pard. 140.)

(*x*) *Pardessus, Collection de Lois Maritimes*, Intr. vi. Pardessus here speaks of a period when "the Roman

arms having successively destroyed the independence of all the navigating states, commerce had no other purpose but to supply the demands and satisfy the enjoyments of the capital of the world."

or revival, or perhaps a mere re-assertion of the Rhodian principle, in its primitive simplicity; and thirdly, after the re-discovery of the lost Pandects, a restoration of the Roman development or commentary. It is doubtful whether the honour of this last restoration belongs originally to Spain or to Italy. Thus, in the *Partidas*, a code of law issued A.D. 1266, under the authority of Alphonso X., there is a body of rules concerning general contribution in case of certain sacrifices made at sea for the common safety, many of which are evidently translated or adapted from the chapter *de jactu* in the Digest(y). In the *Constitutum Usus* of the City of Pisa, the date of which is placed by Pardessus at 1160, there are in like manner evident traces of the Digest, though only a few, and these the simpler, provisions are borrowed from it, as though the Digest were before the framers, but there was a good deal in it too complicated either for their comprehension or, in their opinion, for practical use. Still, by means of those provisions of the Digest which they retained, this Pisan code was able to say much more concerning general average than any of the older or more northern codes.

The word "average" is of much later origin than the thing. Mr. Maclachlan conjectures, indeed, that it is derived from *aversio*, as denoting a means of escape from danger(z); but no trace of the actual use of this metaphor, in classical or subsequent times, has been pointed out by him. On the other hand, there are to be found, in this old Pisan code, some faint traces of what looks like the growth or half-conscious construction of a technical term out of the common Italian word *avere*, the having or property. The code is written in a sort of Italianized

The word
"average,"

(y) 6 Pard. 47—49.

(z) See Maclachlan, Merchant Shipping, chap. 14, Appendix.

or mongrel Latin; the captain, for example, is called *capitaneus*, the sailors *marinari*, and so forth. The word *avere* is used throughout the code to denote the basis of contribution or contributory value; thus, the jettison and damage through jettison, it says, shall be equalized over "*totum avere*," all the property, remaining in the ship. In another place it speaks of those whose *avere* (property) has been cast out, and those whose *avere* is safe (*a*). In a later Pisan code, A.D. 1298, a regulation concerning jettison is headed, "*de divisione haveris projecti*" (*b*). In a Genoese code, A.D. 1341, the word *averia*, or *avarua*, for it is spelt both ways, has come to mean expenses or losses for the common good, and as such forming charges upon the *avere* or entire property (*c*). In a statute of Ancona of 1397, the word *varea* is used to denote the contribution itself (*d*). And in a Venetian code of the 14th century we find the phrase, *dividatur per avariam*, used to express a general contribution (*e*). All sorts of theories have been propounded as to the origin of this word average, which in this sense is universal in all the languages of Europe under various thin disguises, as *avarie*, *haverei*, and the like (*f*). These theories, however, are purely conjectural, whereas here we have something like the vestiges of the actual growth of this peculiar technical expression.

We must, in the next place, direct our attention to the great revolution in maritime commerce, which took

(*a*) 4 Pard. 580-1.

(*b*) Ib. 593.

(*c*) Ib. 521.

(*d*) 5 Pard. 139.

(*e*) Ib. 97.

(*f*) See Manley Hopkins' Handbook of Average, 4th ed. p. 3 *et seq.*, where the different meanings and the derivation of the word are discussed at length. See also "Average," in

Professor Skeat's Etymological Dictionary. The learned Professor, one of the greatest authorities on the etymology of the English language, says that the word is a Mediterranean maritime term of unknown origin. In the New English Dictionary, edited by Sir James Murray, its derivation is also stated to be uncertain.

place when merchants gave up their migratory habits, and began to carry on their business from counting-houses on shore, by means of factors or agents, or branch-houses, at the principal ports with which they traded. This great change was certainly originated by Italians. The great merchant cities of Lombardy, and especially Genoa, Pisa, Florence, and Venice, held, in the 14th and 15th centuries, a position at the head of maritime commerce which it is difficult for us now to realize. It is enough to say, that they were the sea-carriers of the world in a far greater degree than we have a right, at the present day, to use that title for this country (*g*). Each city was an independent republic, and the leading merchants, as the wealthiest, soon began to busy themselves in politics, and become persons of importance on shore. Their long voyages grew, no doubt, extremely inconvenient. It became absolutely necessary to invent some wholesale system of delegation. The faculty of invention was not wanting to the quick-witted Italians, at that time by far the most highly cultivated people in Europe. Accordingly, within no very great space of time, the many remarkable inventions necessary to complete the complicated machinery of modern commerce, followed one another: bills of exchange, book-keeping by double entry, an elaborate system and law of *commando* or agency, and marine insurance, being among the number. Then, by degrees, owners of cargo began to live ashore, a habit which naturally spread until it became practically universal.

(*g*) In the reign of our Henry IV., as we learn from Marshall in his book on Insurance, the Italians were the monopolizers of the commerce of the Mediterranean, through which channel all the wealth of the East, as far

as China, was brought to the West of Europe, and were formidable competitors elsewhere, so that the English merchants petitioned Parliament, but in vain, to be protected against them. (1 Marsh. Ins. 13 (2nd edit.).)

This absence of the merchants inevitably led to a great increase in the power and responsibility of the master, particularly on occasions such as a jettison or sacrificing of a part.

At this time, not improbably—though we have no trace of it—may have arisen a question which has occasionally been discussed of late, namely, whether this ancient system of a general contribution towards sacrifices for the common safety might not with advantage be abolished, as no longer necessary for the carrying on of modern commerce. The master, it might be said, has no longer any interested resistance on the part of a passenger to overcome, and no advice to ask; if he must elect upon occasions between destroying a part and losing the whole, let him be free to do so on his own responsibility, and let his decision be accepted as among the perils of the sea. Merchant and shipowner can protect themselves by insurance. The result in the long run will be much the same, and there will be less friction and complication. Perhaps a wise instinct prevented such counsels from being offered at that time. It may have been felt that the most questionable feature in this revolution in commerce was the leaving to the master, or to the master and mariners at most, the entire responsibility for this sacrificing of part for the whole in time of danger. It is a task of the utmost difficulty and the most vital importance. “On its being performed with coolness, courage, and discretion,” it has been well said, “the whole property, and the lives of all, depend.” Nothing can more tend to the preservation of life and property at sea than that the officer entrusted with this important function should be protected in the exercise of it from whatever may tend to bias or disturb his judgment at that critical moment. He is, however, the

paid servant of the shipowner, liable to dismissal if he displeases him. How is he to avoid partiality, or the suspicion of partiality, when he has to determine by what sacrifice he shall avert a common danger, and to choose, perhaps, between a jettison of cargo and the cutting away of a mast, or bearing up for a port of refuge? Will there not be frequent complaints, well or ill-founded, by the merchant or his underwriters, that a costlier sacrifice of cargo has been preferred when a measure less destructive, but involving a loss to the shipowner would have been equally effectual? The rule of a general contribution, on the other hand, by rendering it immaterial whose property is taken in the first instance, and material only that that should be taken which will most surely and effectually, and at least cost, save the whole, does away with this conflict in the captain's mind between interest and duty, leaves him alone with purely nautical considerations, and thus, no doubt, does more than any statesman or philanthropist can effect for the preservation of life and property at sea. The utility of the rule of general average thus no doubt explains its universality and permanence.

Coming now to a much later period, between the years 1556 and 1584, we find, in the remarkable treatise called the *Guidon de la Mer* ^{Guidon de la Mer.} (*h*), the first express definition of general average. This work is a digest, or unauthoritative code, of the law of insurance, apparently intended for the use of the then newly-constituted consular court of Rouen. Incidentally, however, it touches on other branches of maritime law, such as affreightment, bottomry, and general average.

"The insurer," it says, "is bound to indemnify his merchant for the expenses, losses (*mises*), averages, and damage which occur to

(*h*) For a fuller account of the *Guidon*, see Lowndes, *Marine Insurance*, Intr. xxiv.

the merchandize from the time of loading, the whole of which is comprised in this word *average*, which receives several divisions. The first is called common or gross average, that which arises by jettison, for ransom or composition, for cables, sails, or mast cut for the saving of the ship and merchandize, the compensation for which is levied upon (*se prend sur*) the ship and merchandize; for which reason it is called *common*" (i).

Ordonnance of
Louis XIV.

The Ordonnance of Louis XIV., in 1681, gave the force of law to a definition of general average, evidently modelled upon this of the Guidon. "Every extraordinary expense," it says, "which is made for the ship and merchandize conjointly or separately, and every damage that shall occur to them from their loading and departure until their return and discharge, shall be reputed *average*. Extraordinary expenses for the ship alone, or for the merchandize alone, and damage which occurs to them in particular, are simple and particular average; and extraordinary expenses incurred, and damage suffered, for the common good and safety of the merchandize and the vessel, are gross and common average. Simple averages are borne and paid by the thing which shall have suffered the damage or caused the expense, and the gross and common shall fall as well upon the vessel as upon the merchandize, and shall be equalized over the whole at the shilling in the pound" (*au sol la livre*) (k).

The Ordonnance set an example which was followed throughout Europe. In 1721 was published the Ordinance of Rotterdam, which in like manner begins with a definition, in terms almost identical: "All damage arising from anything that is voluntarily done for the preservation of ship or goods, or for preventing greater

(i) 2 Pard. 387. Examples of general average are afterwards given (ib. 392-6), some of them evidently taken from the Digest. (k) Ord. tit. 7, Arts. 2, 3: 4 Pard. 380.

and more apparent mischief, shall be deemed general average, and be borne by ship and cargo" (*l*). The Ordinance of Bilbao says: "A gross average is that which arises from the means interposed to free the ship and its lading from shipwreck or loss" (*m*).

England was almost the only maritime country which did not possess a code of sea-law. Its early commercial legislation appears to have been regulated by the merchants themselves. The name of Lombard Street on our policies of insurance still attests the tradition which attributes to settlers from the Lombard cities, early branch houses probably in the times of the Medici, the introduction amongst us of the practice of marine insurance. Pardessus gives the text of a statute of the time of William I. concerning jettison; which, however, is not to be found in our statute book, and cannot be safely treated as authentic (*n*). A statute of Elizabeth informs us that questions of insurance and trade had heretofore been dealt with by certain older merchants, "grave and discreet persons," appointed by the Lord Mayor of London, "as men by reason of their experience fittest to understand such matters" (*o*). This statute constituted a special mercantile tribunal to take their place; but this tribunal never found much favour amongst the merchants, and speedily fell into decay (*p*). In the meanwhile, as we learn from such books as Beawes, Magens, and others, published by mercantile men for use among themselves, the rules followed in these matters consisted of a body of customs, in which were embedded provisions borrowed without visible discrimination from the various

(*l*) 2 Magens, 95. The Ordinances of Stockholm (A.D. 1750), of Konigsberg (1730), and of Hamburg (1731), contain similar definitions. (2 Mag. 204, 236, 279.)

(*m*) 2 Mag. 396.

(*n*) 4 Pard. 203.

(*o*) 1 Marsh. Ins. p. 25.

(*p*) Ib. p. 26.

codes and sea-laws of all the countries of Europe. When, in London, Mr. Lloyd's coffee-house came to be the head-quarters of the business of marine insurance, it became also, naturally, the head-quarters of information as to these customs, which hence acquired the familiar title of "the customs of Lloyd's."

It is not till the year 1799, I believe, that we find any trace of the term general average in the English courts of law. "General average," said Lord Stowell, in the Court of Admiralty, "is for a loss incurred, towards which the whole concern is bound to contribute *pro ratâ*, because it was undergone for the general benefit and preservation of the whole" (*q*). This definition was practically superseded by one laid down two years later in the Court of King's Bench by Mr. Justice Lawrence, in the case of *Birkley v. Presgrave* (*r*), on which, as will be shown in the following chapter, the English law of general average has been constructed.

(*q*) *The Copenhagen* (1799), 1 Chr. Rob. 289. The word "average" to denote a general average contribution is, however, found in the report of *Hicks v. Pulington* (1590), Moore, 297, and of *Marshall v. Dutrey* (1719),

Select Cases of Evidence, 58. See also *Sheppard v. Wright* (1698), Show. P. C. 18.

(*r*) *Birkley v. Presgrave* (1801), 1 East, at p. 228.

CHAPTER I.

DEFINITION AND GENERAL PRINCIPLES.

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§ 1. We find, then, that the entire community of sea-faring men and traders by sea have from the earliest recorded times to the present day been of one mind in this particular: that what is in time of danger given or sacrificed for the sake of all shall be replaced by the contribution of all. The Rhodian maxim, and the definition of Mr. Justice Lawrence, are substantially the same. The ordinary conditions of the contract of affreightment, the ordinary relations between master, shipowner, and merchant, and, of course, the motives of natural justice and utility, being the same in all countries, it might have been expected that the practical working out of this simple principle would have been in all

Division of
the subject.

countries the same. This, however, is by no means the case: there are very material variations. This fact of itself proves that there must be something wrong or imperfect in the law of some country; and as, in maritime commerce, the dealings of one country with another are so closely interwoven that each runs the risk of suffering if the sea-laws of another are faulty, strenuous efforts have been made to bring about an international uniformity in this matter of general average. This undertaking I do not here speak of except as something theoretically desirable in the future, the existence of which strongly points the moral, that general average as it is in theory, and general average as it is in the existing law and practice of any individual community, are two different things. Our business at present is to ascertain what is in fact, at this day, general average, as accepted in the law and practice of Great Britain. This must be studied in the main in the historical method, and principally by setting forth, in order, and with as much fulness as may enable us to understand the reasons which influenced the judges, the decisions on each material point. The division of the subject is in its nature remarkably simple. It falls under two main questions: first, what losses or expenses are to be replaced by contribution; secondly, how is the contribution to be regulated, or adjusted. The first question, which is by far the most difficult and important, is conveniently divided under three principal heads: sacrifices of cargo, sacrifices of parts of the ship, and extraordinary expenses. This forms the subject of the four following chapters. In the present chapter I propose to discuss a few preliminary questions, which do not conveniently fall under either of these main divisions.

§ 2. We may begin by examining the precise form Definition. in which the definition of general average has been adopted into the law of England.

The first modern case in which the sanction of an English court of common law was given to the principle of general average was that of *Birkley v. Presgrave* (a), in 1801. The principle, indeed, does not appear to have been contested at the trial of this case, but is treated in argument as a thing long established and well known, and the dispute was only as to some particular point of its application (b). One of the judges, however, Lawrence, J., began the argument of his judgment with the following sentence:—“*All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested*” (c).

(a) 1 East, 220.

(b) See below, § 23.

(c) 1 East, at p. 228. The words “all loss” in this definition, said Gorell Barnes, J., in *The Leitrin*, [1902] P. 256, 266, must be read with some limitation; they ought not to cover losses which “are the result of ‘accidental circumstances’ affecting the loser, and are not losses which the other persons interested ought in ordinary course to be treated as concerned with.” On this principle jettisoned goods are valued at their market price at the time when they would have arrived, though their owner may have sold them, “to arrive,” at a higher price. (See *post*, p. 337.) In *The Leitrin* the shipowners were claiming for a loss of time freight, under a cesser-of-hire clause in the time charter, while general average damage was being repaired, and one of the grounds on which the learned judge held that

they could not recover was that the contract between the shipowners and the time charterers was a matter with which the owners of the cargo were not concerned, and the loss of freight under it the result of an accidental circumstance peculiar to the shipowners and the time charterers. Mr. Carver (§ 435) criticises this part of the judgment, saying that the obligation to contribute does not depend upon privity of the contributor to any contract with the owner of the thing sacrificed. As he points out, different portions of a cargo contribute *inter se* without any such privity. Further, one cargo-owner contributes to a loss of freight on the goods of other cargo-owners under contracts of carriage to which he is not a party. It, therefore, seems impossible to maintain the rule laid down by the learned judge, if it implies that a loss, arising directly out of a contract made be-

This sentence is almost identical with the definition given, in 1681, in the Ordonnance of Louis XIV. : “Extraordinary expenses incurred, and damage suffered, for the common good and safety of the merchandize and the vessel, are gross and common average . . . and shall be equalized over the whole [ship and merchandize] at the shilling in the pound ” (*au sol la livre*)(*d*).

The words of Lawrence, J., which may be regarded as a slight improvement, in form certainly, on those of the Ordonnance, have naturally been always treated as of the highest authority, and have been cited again and again in our courts till this sentence has become a sort of axiom. It is adopted and used as a test in *Covington v. Roberts*(*e*), and in *Job v. Langton*(*f*). “It has been considered,” says Brett, M. R., “to be one of the many happy expositions of mercantile law made by that learned person, in terms so broad and yet so accurate, as show that he was one of the greatest mercantile lawyers who has ever adorned our profession in this country ”(*g*). In this case, also, the learned judge uses this sentence as a test.

Other
definitions.

Variations, substantially however amounting to much the same thing, have been offered by other judges. “In order,” says Blackburn, J., “to give rise to a charge

tween parties to the common maritime adventure can never be treated as a general average loss as against another party to the adventure who is not a party to the contract. But Gorell Barnes, J., does not use the word “privity” in his judgment, and probably did not intend to lay down so wide a proposition. Another ground of his decision, to which Mr. Carver does not take exception, is that the loss of time was common to all the parties interested, and there-

fore might be left out of consideration.

(*d*) Ord. Louis XIV. tit. 7, Arts. 2 and 3: 4 Pardessus, 380. I may add that the substitution of the word “preservation” for “good and safety” is a real and important improvement. (See below, § 6.)

(*e*) (1806). 2 B. & P. (N. R.) 379.

(*f*) (1857), 6 E. & B. 779, at p. 790.

(*g*) *Scendsen v. Wallace* (1884), 13 Q. B. D. 69, at p. 73.

as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy. An extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether a shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off" (*h*). "The claim for general average arises," said Wilde, C. J., "where part of a cargo or ship is destroyed in order to rescue the remainder from some impending peril. If, during a voyage, by stress of weather or otherwise, a vessel is in immediate danger of being lost, and part of the cargo is thrown overboard, or a mast is cut away, as a means of preventing the total loss of vessel and cargo, that loss, being incurred for the common benefit of all concerned, shall not be sustained by the owner of the ship alone, but by a general contribution from all" (*i*). "It is a loss," says Lord Kingsdown, "incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law liable to contribute rateably" (*k*). A more recent definition is one given by a late Master of the Rolls, Lord Esher: "Wherever under extraordinary circumstances of danger to both ship and cargo, a voluntary sacrifice of money" (*read*, property or money) "is made, in order to save

(*h*) *Kemp v. Halliday* (1865), 6 B. & S. 723, at p. 746; 34 L. J. (Q. B.) 233, at p. 242.

(*i*) *Hallett v. Wigram* (1850), 9 C. B. 580, at p. 601; 19 L. J. (C. P.) 281, at p. 288.

(*k*) *Cargo ex Galam* (1863), 33 L. J. (Adm.) 97, at p. 102. See further *Johnson v. Chapman* (1865), 19 C. B.

(N. S.) 563, at p. 583; *Pletcher v. Alexander* (1868), L. R. 3 C. P. 375, at p. 381; *Walther v. Macraji* (1870), L. R. 5 Exch. 116, at p. 124; *Stewart v. West India and Pacific S.S. Co.* (1873), L. R. 8 Q. B. 88, at p. 93; *Whitecross Wire Co. v. Savill* (1882), 8 Q. B. D. 653, at pp. 661, 662.

both ship and cargo, by the expenditure of which both ship and cargo are saved, the person who has made the voluntary sacrifice is entitled to call upon the others, whose property has been saved by the voluntary sacrifice made on their behalf as well as his own, for general average contribution" (l). Another definition is that given by Bovill, C. J. : "If loss or expense is occasioned by reason of some extraordinary course taken, or risk incurred, for the benefit of all concerned, then those who, by reason of their being exposed to a common danger, are interested in that course being taken, or that risk incurred, must contribute their share" (m).

Transition to
definition in
Rhodian law.

It may be doubted, however, whether any one of these definitions of general average equals, in accuracy and concise fulness, the original maxim of the Rhodian law, which in so few words gives the rule, the reason for it, and a typical example (n).

"General average," says Lord Blackburn, in a very recent case, "is founded on the Rhodian law; which, however, in terms did not extend further than to cases of jettison, but its principle applies and it has been applied to all other cases of voluntary sacrifice for the benefit of all, that is, if properly made" (o).

Thus it will be seen that the English Courts have, as a matter of history, received the maxim of the Rhodian

(l) *Ocean Steamship Co. v. Anderson* (1883), 13 Q. B. D. 651, at p. 662.

(m) *Walther v. Makrogianni* (1870), L. R. 5 Exch. 116, at p. 120.

(n) See the judgment of Watkin Williams, J., in *Piric v. Middle Dock Co.* (1881), 4 Asp. Mar. Law Ca. 388, at p. 390. Parsons, referring to this maxim, says:—"This law was in force in the commerce of the Mediterranean and Adriatic seas more than a thousand years before the

Christian era; nor can there be a better definition of the law of general average as it is in force to-day." (Parsons, *Law of Shipping*, Boston, 1869, p. 339.)

(o) *Anderson v. Ocean S.S. Co.* (1884), 10 App. Cas. 107, at p. 114. As to these last three words, see below, § 4. See also *Burton v. English* (1883), 12 Q. B. D. 218; *post*, p. 28.

law through the medium of the Ordonnance of Louis XIV.; and in later times some of our most eminent judges have shown an inclination, instead of dwelling over-closely on the words of Lawrence, J., to direct their attention to the original source.

[Section 66 of the Marine Insurance Act, 1906, contains a definition of general average losses which, as general average has the same meaning in contracts of marine insurance as it bears between the parties engaged in a maritime adventure, will no doubt be cited henceforth as the authoritative one. It is as follows:—

Sub-sect. 1. A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

Sub-sect. 2. There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

In *Montgomery v. Indemnity Mutual Marine Insurance Co.* (oo), it is suggested in the judgment of the Court of Appeal that a sacrifice made “in fear of death,” but not apparently for the purpose of saving property, may be general average. Sacrifice in
fear of death.

“It is not, we think, true,” says Vaughan Williams, L. J., delivering the judgment of the Court, “to say that it is only the danger to the ship, freight or cargo which necessitates and justifies sacrifice by the master of either a portion of the cargo or a portion of the ship. This may be done in fear of death, and if it be done upon a proper occasion all must contribute to the loss.”

In practice the case is not likely to arise in which the ship and cargo are not imperilled by a danger which threatens the lives of the persons on board the vessel; and if the effect of sacrificing part of the property in

fear of death has been to save that which remains, it may well be that a Court would not inquire whether the saving of the property was actually in the mind of the master when he directed the sacrifice, but would impute such a motive to him. Yet if there could be a case in which a portion of the ship or cargo has been sacrificed in fear of death, without any expectation or possibility of advantage to the owners of the property which remains, there are no authorities except this dictum which support the view that there would be a liability to contribute to general average (*p*).]

True origin
of the right
to general
average :
whether
natural equity
or contract.

§ 3. A still deeper question has latterly been discussed in our courts : Is the right to general average founded on authority merely, no matter whether that of the Rhodian, or Roman, or of any later positive law, or of immemorial custom, or on some more primary grounds? and, if the latter, are they grounds of natural equity or utility, or do they rest on some contract between the parties, originally perhaps express, but which in course of time has come to be constantly implied, or on some theory as to agency?

Older English
law writers.

The older English law writers on average, probably following Emerigon and other French lawyers, based

(*p*) The definition of a general average act in the Marine Insurance Act, 1906 (*supra*, p. 25), seems opposed to the dictum. In *The Gratitudine* (see *infra*, p. 56), Lord Stowell says that in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, the whole cargo may be thrown overboard, and the ship must contribute its average proportion; but the case which he puts is evidently one in which the object is to save the lives of those on board by preserving the vessel. It may also be pointed

out that general average is in many respects analogous to salvage, and that there was no power, until it was given by statute, to remunerate the salvor of life only, at the expense of the property. The statement in *Morse's case* (see *post*, p. 55), that "everyone ought to bear his loss for the safeguard and life of a man" may also be cited; but it cannot safely be assumed that the Court in making it had the question of general average in mind.

this right simply on natural justice. Lord Tenterden, for example, speaks in this sense (*q*): and Park, J., in his valuable book on insurance, says, concerning general average: "This obligation . . . is founded on the great principle of distributive justice; for it would be hard that one man should suffer by an act which the common safety rendered necessary, and that those who received a benefit from that act should make no satisfaction to him who had sustained the loss" (*r*).

Such considerations and even phrases as natural justice or general utility as the basis of rights between contracting parties, though no doubt secretly underlying the decisions of our judges, do not ordinarily appear on the surface so frequently as the familiar mediæval notions of implied contracts or implied agency. Hence, in proportion as the subject of general average came to be more familiar, it seems to have been felt to be more consonant to the spirit of the English common law, that in seeking to place this right of contribution on a secure basis, some implied contract or implied agency should, if possible, be found for it to rest on. Several such easily presented themselves. It might be supposed, for instance, that, at the time of shipping or entering into the contract for shipping the goods, each shipper impliedly contracts with the shipowner and with each other, that the master shall have authority in case of danger to make all needful sacrifices, to the expense of which he, the shipper, will contribute his share; or it may be supposed that a similar engagement is made between the parties, at the moment of danger, treating them as if on the spot, as they originally were; or, again, if an implied agency is preferred, the master may be supposed to have, in

Later views.

(*q*) Abbott on Shipping, 5th edit.

(*r*) Park, Ins. 8th edit. 277.

virtue of his office, an authority to do for each cargo-owner, as well as for the shipowner, whatever any one of those parties would have had the duty or the power to do had he been on the spot; so that the master's act should on each occasion be taken to be, and treated as if it were, the act of his appropriate principal.

These differing views of the origin of this right, though the variations are obviously more of appearance than reality, have of recent years given rise to an interesting discussion among some of our judges.

*W. Williams,
J.*

“It is a law,” says Watkin Williams, J., speaking of the law of general average, “founded upon justice, public policy, and convenience, and rests . . . upon reasons which are so obvious that it is not surprising to find that it is older than any other law or rule in force. . . . This principle of law must, in my judgment, be regarded as incorporated in, and forming part of, the unwritten law of England” (*s*).

Lord Bramwell.

Lord Bramwell, delivering the judgment of the Court of Appeal in *Wright v. Marwood* (*t*), said:—

“When such sacrifice is made, as here, for the common good, as a rule it comes within general average, and must be borne proportionally by those interested. It is not necessary to say what is the origin or principle of the rule, but, to judge from the way it is claimed in England, it would seem to arise from an implied contract *inter se* to contribute by those interested” (*u*).

Brett, M.R.

Subsequently, in *Burton v. English* (*x*), likewise in the Court of Appeal, Brett, M. R. (Lord Esher), criticised this passage in the following terms:—

“How does such a claim [for jettison of cargo] arise? In theory it arises from an act done by the master of a ship, not as the ser-

(*s*) *Pirie v. Middle Dock Co.* (1881),
4 Aspinal's Mar. Law Ca. 388, at
p. 390.

(*t*) (1881). 7 Q. B. 1). 62, at p. 67.

(*u*) See to the same effect, Mac-
lachlan, *Merchant Shipping*, 4th
edit. p. 689 (5th edit. p. 734, n.).

(*x*) (1883), 12 Q. B. D. p. 218.

vant of the shipowner, but as the servant of the cargo-owner, a relation which is imposed on him by the necessity of the case (*y*). It arises by reason of a voluntary sacrifice by the cargo-owner for the benefit of the ship and freight, and not from any act done for the shipowner at all. By what law does the right arise to general contribution? Lord Bramwell, in his judgment in *Wright v. Marwood* (*z*), considers it to arise from an implied contract; but though I always have great doubts where I differ from Lord Bramwell, I do not think that it forms any part of the contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved" (*a*).

A little later the same learned judge says:—

"The acts of the captain with reference to properly or im-

(*y*) "Though in the ordinary state of things the master of a ship is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care." (Per Lord Stowell, in *The Gratitude* (1801), 3 Ch. Rob. 257.)

"The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. In the circumstances supposed, something must be done, and there is nobody present who has authority to decide what shall be done. The master is invested by presumption of law with

authority to give directions on this ground, that the owners have no means of expressing their wishes." (Per Lord Kingsdown, *Duranty v. Hart* (1864), 2 Moore, P. C. C. (N. S.) 289, at p. 321; 33 L. J. (Adm.) 116, at p. 118.)

(*z*) (1881), 7 Q. B. D. 62, at p. 67.

(*a*) *Burton v. English* (1883), 12 Q. B. D. 218, at p. 220. See also *Simonds v. White* (1824), 2 B. & C. 805, at p. 811, where Abbott, C. J., says: "The principle of general average . . . is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law." He then proceeds to say that "the obligation may be limited, qualified, or even excluded by the special terms of a contract, as between the parties to the contract."

properly jettisoning part of the cargo are not both done by him in the same capacity; one is done by him as the agent of the cargo-owner, and the other as the servant of the shipowner" (b).

Bowen, L. J.

Bowen, L. J., delivering his judgment on the same case, sums up the matter discussed in this section so as quietly to indicate that we are not, after all, to suppose it to be of any great practical importance (c). He says:—

"In the investigation of legal principles, the question whether they arise by way of implied contract or not often ends by being a mere question of words. General average contribution is a principle which comes down to us from an anterior period in our history, and from the law of commerce and the sea. When, however, it is once established as part of the law, and as a portion of the risks which those who embark their property upon ships are willing to take, you may, if you like, imagine that those who place their property on board a ship on one side, and the shipowner who puts his ship by the quay to receive the cargo on the other side, bind themselves by an implied contract which embodies this principle; just as it may be said that those who contract with reference to a custom impliedly make it a part of the contract. But that way, though legally it may be a sound way, nevertheless is a technical way of looking at it. This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act done

(b) 12 Q. B. D. at p. 221.

(c) Mr. Carver considers that the matter may be important in view of the practice, now very general, of stipulating in bills of lading that a particular code of rules shall govern the amount to be paid in general average. "Such a stipulation," he remarks (§ 364), "is binding as between each shipper and the shipowner; but unless the shipowner is also considered to contract on behalf of all the other shippers, or unless an agreement of the shippers *inter se* can be inferred from their knowledge that all the bills of lading will con-

tain such a provision (cf. *Grange v. Taylor*, (1904), 20 Times L. R. 386), it would seem that as between one shipper and another, the ordinary rules of law on the subject must prevail." The judgments of A. L. Smith and Vaughan Williams, L.JJ., in *Milburn v. Jamaica Fruit Co.*, *infra*, also show that the question, what is the basis of general average, may sometimes have a practical bearing on a matter in issue. Indeed, the dissenting judgment of the latter is entirely founded on the view that general average does not rest on contract.

by the captain as agent, not for the shipowner alone, but also of the cargo-owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo" (d).

[In *Milburn v. Jamaica Fruit Importing Co.* (e), A. L. Smith and Vaughan Williams, L. J.J., expressed views on this point which agree with that of Lord Esher. The former says:—

"The foundation of a general average claim is ordinarily not that of contract, but it is founded upon a loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo in the time of peril, and which must be borne proportionately by all who are interested."

Similarly, Vaughan Williams, L. J., says:—

"The liability to contribute in no sense results from the contract of carriage, but exists wholly independently of the contract of carriage, by virtue of the equitable doctrine of the Rhodian law, which as part of the law maritime has been incorporated in the municipal law of England" (f).]

§ 4. We must, in the next place, consider more at large the force of the pregnant words of Lord Blackburn, above cited, "*that is, if properly made*" (g). The law of general average, it is to be borne in mind, is no part of the law of marine insurance. This contribution was in full force for centuries before insurance was invented. It is a portion of the law of Carriage by Sea, which falls within the contract of affreightment, and is regulated by its conditions: and it seems to be now settled

Danger must
not be from
fault of
claimant.

(d) *Barton v. English*, 12 Q. B. D. 218, at p. 223.

(e) [1900] 2 Q. B. 540, at pp. 546, 550.

(f) The same view has been expressed in several recent decisions of the American Courts: see *The*

Roanoke (1893), 59 Fed. R. 161; *Marwick v. Rogers* (1895), 163 Mass. 50; *The Eliza Lines* (1896), 61 Fed. R. 308, 325.

(g) *Anderson v. Ocean S.S. Co.*, 10 App. Cas. at p. 114; *ante*, § 2.

by the law of England that whereas the law of marine insurance has grown up in subordination to the maxim *causa proxima non remota spectatur*, that is to say, by looking no further back than to the immediate cause of loss, so that the underwriter is liable if the ship is lost, for example, by a collision, stranding, or sinking, no matter though that mishap were brought about through the fault or neglect of a seaman, or through any other cause except the wilful misconduct of the assured himself (*h*); yet in the law of affreightment, that is to say, in determining the mutual relations of a shipowner and the owners of goods on board his ship, it is otherwise.

[The shipowner usually engages by his contract to deliver the goods entrusted to his care, subject to certain excepted causes of loss or damage. "But the shipowner's obligations are not limited and exhausted by what appears on the face of the instrument. Underlying the contract, implied and involved in it, there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the shipowner, it seems to follow as a necessary consequence, that even in cases within the very terms of the exception in the bill of lading" (or charter-party) "the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss" (*i*). Similarly, the

(*h*) See Marine Ins. Act, 1906, s. 55 (2) (a).

(*i*) Per Lord Macnaghten in *Wilson v. Cargo per Xantho* (1887), 12 App. Cas. 503, 513. This statement of the law is admirable in its simplicity and clearness. Substantially to the same effect is a passage in the judgment of Willes, J., in *Grill v. Iron*

Screw Collier Co. (1866), L. R. 1 C. P. 600, 611, which has frequently been quoted in subsequent cases. The passage is as follows: "I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the

effect of a breach of the warranty of seaworthiness is that the shipowner is liable for any loss or damage that happens to the cargo in consequence of the unseaworthiness, even though the immediate cause be a peril excepted by the contract of carriage (*j*).

Shipowners have successfully endeavoured to protect themselves against these liabilities by clauses in their contracts of affreightment which exempt them from

contract, and is caused by perils of the sea: the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract. In the case of a bill of lading it is different, because the contract is to carry with reasonable care, unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner he is liable for this breach of his covenant."

Similarly, in *Wilson v. Owners of Cargo per Xantho* (1887), 12 App. Cas. at p. 510, Lord Herschell said: "I quite agree that in the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such

perils. But I do not think this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage, excluding, in certain cases, the operation of the exception. It would, in my opinion, be very objectionable, unless well-settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments. The true view appears to me to be presented by Mr. Justice Willes in his judgment, &c." His lordship then cited the words above quoted. See also the judgment of Lord Blackburn in *Steel v. State Line S.S. Co.* (1877), 3 App. Cas. 72, at p. 87.

(*j*) *Kopitoff v. Wilson* (1876), 1 Q. B. D. 377; *Cohn v. Davidson* (1877), 2 Q. B. D. 455; *Steel v. State Line, supra*; *The Glenfruin* (1885), 10 P. D. 103. The shipowner also impliedly warrants that the ship is reasonably fit to receive and carry the cargo: see *Tattersall v. National S.S. Co.* (1884), 12 Q. B. D. 297; *McFadden v. Blue Star Line*, [1905] 1 K. B. 697. This fitness is sometimes regarded as being included in the warranty of seaworthiness. See *Owners of Cargo ex Maori King v. Hughes*, [1895] 2 Q. B. 550, 557; *Sleigh v. Tyser*, [1900] 2 Q. B. 333.

responsibility for the negligence of their servants, or for losses brought about by the unseaworthiness of the vessel(*k*); but here we can do no more than deal briefly with that aspect of this question which directly concerns the law of general average.]

Before either the shipowner or the owner of cargo can claim contribution as general average for a sacrifice of his property, or an expense incurred by him, in order to avert a total loss of ship and cargo, he must be in a position to prove in case of need that the total loss in question was not one for which he himself would have had to pay. For, if the loss of ship and cargo were one which must ultimately have fallen upon himself, it cannot be said that any sacrifice made by him to avert that loss was really made for the benefit of any one except himself.

For example, the shipowner, in every contract of affreightment, impliedly engages with the shipper of goods by reason of the warranty of seaworthiness that his ship, on the commencement of her voyage, is seaworthy for that voyage and supplied with a competent crew(*l*). If, then, she is in fact not so, and in consequence the cargo suffers damage or is lost, this loss must fall on the shipowner; and this no matter whether the loss or damage is directly attributable to the unseaworthiness, as by sea-water entering through a hole or leak in the bottom which ought not to be there, or more directly to an accident or sea peril, as by her sinking in

(*k*) The warranty of seaworthiness will, however, only be excluded by stipulations so clear as to admit of no other construction: see *Gilroy v. Price*, [1893] A. C. 56; *McIver v. Tate Steamers*, [1903] 1 K. B. 362 (C. A.); *Rathbone v. McIver*, [1903]

2 K. B. 378 (C. A.); *Elderslie S.S. Co. v. Borthwick*, [1905] A. C. 93; *Nelson Line v. James Nelson & Sons, Ltd.*, [1908] A. C. 16; *South American Export Syndicate v. Federal Steam Nav. Co.* (1909), 14 Com. Cas. 228.

(*l*) See the cases in note (*j*), *supra*.

a gale or from a blow of the sea, which her plates or fastenings ought to have been, but were not, strong enough to have resisted. If, then, the owner of a ship thus unseaworthy, or his servant the master, makes some sacrifice or goes to some extraordinary expense, in order to prevent such a loss of cargo as well as ship, he can claim no contribution from the cargo as general average, for in saving the cargo no less than in saving the ship he ultimately benefits the shipowner alone. Thus, for the cost of bringing a leaky ship into a port of refuge, the shipowner has no claim upon the merchant for general average, if the leak were occasioned by the ship's unseaworthiness; nor has he such a claim even upon his own underwriter on a time policy, although there is in that policy no warranty of seaworthiness (*m*).

Again, although in the contract of affreightment the shipowner usually protects himself against absolute liability towards the owner or shipper of cargo by such clauses as "perils of the seas," or "accidents of navigation excepted," and sometimes, especially in the case of steamers, with very elaborate variations on that theme, it is always to be remembered that (as we have seen) he impliedly undertakes to use all reasonable diligence on the part of his servants towards performing his undertaking to deliver the goods at their destination in the like good order as when shipped; so that the exceptions he makes are always interpreted as operative only in case these perils and accidents render that performance impossible in spite of all such reasonable diligence (*n*).

(*m*) *Fawcus v. Sarsfield* (1856), 6 E. & B. 199. See also *Worms v. Storey* (1855), 11 Exch. 427; 25 L. J. Ex. 1; *Schloss v. Heriot* (1863), 14 C. B. (N. S.) 59; *The Norway* (1865), Br. & Lush. 377; *Lindsay v. Klein*, [1911] A. C. 194. And see *Cargo ex Laertes* (1887), 12 P. D. 187.

(*n*) That is, as pointed out by Lord Blackburn in *Steel v. State Line* (1877), 3 App. Cas. at p. 88, unless there is in the contract some special

If, without a gale, or fog, or any accident, the master, by a blunder in his reckoning, or a seaman, by steering badly or neglect of soundings, runs the ship ashore, the owner must get her off at his own expense, and pay for any damage done to the cargo: he cannot ask the cargo to contribute(*o*). In the case of a collision with another ship, the position is the same, providing the collision is the result of some fault on board his own ship(*p*).

The broad principle may be laid down, then, that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of some one for whose acts the claimant has made himself, or is made by law, responsible towards the co-contributors(*q*).

clause to the contrary, such as "whether caused by the negligence of the crew, or not." For the effect of such a clause with regard to general average, see *infra*, p. 37.

(*o*) *The Ettrick* (1881), 6 P. D. 127, at pp. 133, 135. "If the plaintiff," said Brett, L. J., "had not been in any fault, I am inclined, at present, to think that he would have been entitled to claim from the defendant if it was a general average contribution. But he has been in fault, and the authorities are conclusive that if the general average contribution which he claims is a general average contribution which arose by reason of a default of his, he cannot claim anything" (at p. 135). And Cotton, L. J., at p. 137, in the same case, said:—"It would be against equity to say that the person who himself has done the wrongful act which caused the expenditure shall claim thereupon from anybody else." See also *Robinson v. Price* (1876), 2 Q. B. D. 91; per Willes, J., in *Johnson v. Chapman*

(1865), 19 C. B. (N. S.) 563, at p. 581.

(*p*) As a collision is a peril of the sea, the shipowner is protected by the exception of "perils of the seas" from liability to the owners of his cargo, when his own ship is not in fault. (*Wilson v. Owners of Cargo per Xantho* (1887), 12 App. Cas. 503, overruling *Woodley v. Michell* (1883), 11 Q. B. D. 47.) So, also, he is protected by the exception of "accidents of navigation." (*Sailing Ship Garston Co. v. Hickie* (1886), 18 Q. B. D. 17.) In the case, however, of a collision caused by the fault of another vessel belonging to the owner of the carrying ship, he would not be protected by either exception from a claim in tort by the cargo-owners against him as owner of the wrongdoing vessel. (*Chartered Mercantile Bank of India v. Netherlands India Steam Nav. Co.* (1883), 10 Q. B. D. 521 (C. A.).)

(*q*) See *Strang v. Scott* (1889), 14 App. Cas. 601, where Lord Watson, delivering the judgment of the Privy

[This principle, however, has no application when the contract of carriage would have exempted the claimant from responsibility for the loss, to avert which the sacrifice was made; it is no defence to the shipowner's claim that the necessity of the sacrifice arose from the negligence of the master or crew, when the bill of lading or charterparty contains a clause excepting their negligence(r). In *The Carron Park*(s), Lord Hannen

Council, said:—"When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrong-doer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save." This is not the same thing as to say that there can be no claim for general average if the danger has arisen from the fault of the shipowner or his servants. A party who has not himself been in fault, *e.g.*, an owner of cargo, may have such a claim. (*Strang v. Scott*, *supra*.) This is illustrated by a decision of the Admiralty Division in the case of *The Argo*. This ship having been run aground through faulty navigation, the shipowner was held not entitled to claim as general average

the expense incurred by him in getting the ship and cargo off the strand, but the owner of the cargo was entitled to recover contribution from the shipowner as general average towards the loss of cargo jettisoned for that purpose. (*Argo*, *Maritime Register*, 24 March, 1882.) The cargo-owner in this case might presumably have gone further, and claimed from the shipowner the entire loss. But as an owner of cargo jettisoned may, if he pleases, claim from each contributor direct (*Dobson v. Wilson* (1813), 3 Camp. 480), and as the fault of the shipowner would not be an answer, as between one owner of cargo and another, to such a claim (*Strang v. Scott*, *supra*), it would seem that there would, in a case like that of *The Argo*, be a double remedy. The merchant may either claim all at once from the shipowner, or he may demand rateable contribution from each who has gained from his gift or sacrifice, leaving his fellow-merchants to their ultimate remedy against the shipowner who was in fault.

(r) *Strang v. Scott*, *supra*; *The Carron Park* (1890), 15 P. D. 203; *Milburn v. Jamaica Fruit Importing Co.*, [1900] 2 Q. B. 540 (C. A., Vaughan Williams, L. J., dissenting). These decisions were recently

(s) *Supra*.

said:—"Negligence for which he" (the shipowner) "is not responsible is as foreign to him as to the person who has suffered by it . . . Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract that the shipowner shall not be responsible for the negligence of his servants in the events which have happened."

The Harter
Act.

Contracts for the carriage of goods on Atlantic voyages frequently contain a clause incorporating the provisions of the "Harter" Act, a statute of the United States, passed in 1893, to regulate the trade between the United States and foreign ports. Sections 1 and 2 of the Act prohibit and avoid clauses which relieve the shipowner from the duty to take care of the cargo and provide a seaworthy ship; but section 3 enacts that if the shipowner has exercised due care to make the vessel seaworthy, neither he, the vessel, her agent, nor her charterer shall be liable (*inter alia*) for damage or loss arising from faults or errors in navigation, or in the management of the vessel (*t*). The Supreme Court of the United States has held that this exemption in the Act has not the effect of entitling the shipowner to claim a contribution for a general average loss caused by the negligence of his servants (*u*). It may be argued that the incorporation of the Harter Act in an English contract (*v*) has no greater

followed by the Court of Session in *Klein v. Lindsay*, [1910] Sess. Cas. 230.

(*t*) These provisions do not apply to the transportation of live animals. For the text of the Act, see Carver, s. 103a; *Dobell v. S.S. Rossmore Co.*, [1895] 2 Q. B. 408.

(*u*) *The Irrawaddy* (1897), 171 U. S. 187. If, however, the cargo-owner in a case within the exemption were to claim a general average con-

tribution from the shipowner, the damage to the ship would also have to be taken into account; otherwise the cargo-owner could, by selecting his form of procedure, recover for losses for which the shipowner was not responsible. (See *The Strathdon* (1900), 101 Fed. R. 600; *The Jason* (1908), 162 Fed. R. 56.)

(*v*) See *post*, p. 277, as to when the contract will be deemed to be English.

effect than is attributed to it by American law, so that, notwithstanding the decisions in *The Carron Park* and *Milburn v. Jamaica Fruit Importing Co.* (*x*), the shipowner is not entitled to contribution for a loss due to the negligence of his servants in the navigation or management of the vessel. It has, however, been held that the legal result, if the contract is expressed to be subject to the provisions of the Act, is only the same as if the material clauses of the Act were written into the contract (*y*). It is therefore submitted, that under an English contract incorporating the Act, the shipowner would not be precluded by the decision of the Supreme Court from claiming contribution; the incorporation of the Act is only equivalent to the insertion of a negligence clause in the terms of the Act.]

§ 5. The question of cause leads naturally to that of consequences. To what extent, according to English law, is the act of sacrifice, which gives rise to contribution, to be followed out to its more or less remote consequences? Rules as to consequences.

This is not fully expressed in the definition. The Rhodian maxim says nothing whatever about it. Lawrence's axiom, "all loss which arises in consequence," if taken quite literally, which, however, it probably was never meant to be, might go too far. It can hardly be intended, apparently, that every loss which would not or could not have taken place, had the sacrifice not been made, must be replaced by contribution. The cutting away of a mast, for example, while saving the ship and

(*x*) *Supra*, p. 37.

(*y*) *Dobell v. S.S. Rossmore Co.* (1895), 2 Q. B. 408 (C. A.). "They then introduce into their bill of lading the words of the Harter Act, which I decline to construe as an Act, but

which we must construe simply as words occurring in this bill of lading." (Per Lord Esher, *ibid.* See also *Rowson v. Atlantic Transport Co.*, [1903] 2 K. B. 666 (C. A.).)

cargo from some imminent danger, may, by retarding the ship's sailing, bring them within the action of some new danger, from which they would otherwise have been free through having reached their destination. Suppose that from this cause she were to fall into an enemy's hands, it could hardly be contended that the loss by capture should be replaced by contribution as a consequence of cutting away the mast. This illustration may suggest, indeed, a possible solution of our difficulty founded on the English law with regard to damages.

In the case of *The Notting Hill*, in 1884, Brett, M. R., speaking generally as to the principles of English law with regard to remoteness of damage, says:—

“The rule with regard to remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort, and it has been laid down many times, both in *Hadley v. Baxendale* (z) and other cases. In Mayne on Damages (3rd edit.), at p. 39, it is thus stated: ‘The first, and in fact the only, inquiry in such cases is, whether the damage complained of is the natural and reasonable result of the defendant's act? It will assume the character if it can be shown to be such a consequence as in the ordinary course of things would flow from the act, or, in cases of contract, if it appears to have been contemplated by both parties’ ” (a).

Applying this rule more closely to general average, it may be thought that, since we have to determine *quod pro omnibus datum est*, and since giving must always imply an intention to give, what we have here to ascertain must be, what loss at once has in fact occurred, and likewise must be regarded as the natural and reasonable

(z) (1854), 9 Exch. 341; 23 L. J. 105, at p. 113. In the 8th (latest) edition of Mayne on Damages, this passage is found at p. 54.

(Ex.) 179.

(a) *The Notting Hill* (1884), 9 P. D.

result of the act of sacrifice? or, in other words, what the shipmaster would naturally, or might reasonably, have intended to give for all when he resolved upon the act? If, then, upon the act of sacrifice any loss ensues, which the master did not in fact bring before his mind at the time of making the sacrifice, it would have to be considered whether it were such a loss as he naturally might or reasonably ought to have taken account of (*b*).

It must further be borne in mind, in applying this principle, more particularly to sacrifices consisting of disbursements, that for several purposes it is occasionally necessary to group together a series of consecutive events or situations, as for practical purposes constituting one entire operation, and to treat this aggregate as the cause of whatever loss is in this sense the consequence of any part of it. The rescuing of a ship and cargo from a position of danger (*e.g.*, when sunk, or aground, or requiring to be carried into a port of refuge), may not be practicable by any single measure, to be resolved on and completed in the same hour or even day; it may require a series of exceptional measures, each only to begin when the previous one is completed, each perhaps involving an extraordinary expenditure, yet each of no value as means towards the common end, unless followed up by the others. Such a series must evidently be treated as a whole, and cannot be properly treated without

(*b*) This passage was quoted with approval by Bigham, J., in *Anglo-Argentine Live Stock, &c. Agency v. Temperley*, [1899] 2 Q. B. 403, at p. 409. See also *McCall v. Houlder Bros.* (1897), 66 L. J. Q. B. 408. The question, as from its metaphysical character might have been anticipated, appears to have been much considered by the learned

framers of the German Code; and the result is summed up by Ulrich, in his valuable book on general average, to the effect that those consequences should be brought in which either were or ought to have been foreseen in making the sacrifice, or which stood in causal connection with it. (Ulrich, *Grosse-Haverei*, p. 5; cf. Appendix J., p. 547.)

bringing in all those consequences which might have been, and by a judicious shipmaster or other actor of the sacrifice would have been, taken into account in determining whether or not to embark in that series of operations (*c*).

Maxim of
adjustment.

§ 6. On that principle of natural justice embodied in the maxim so long used on the equity side of our courts, "He who claims equity must render equity," it has from time immemorial, and in all countries, been the rule, in adjusting general average, that the property which has been sacrificed shall bear its share as a contributor no less than if it had been saved. More precisely, the contribution is to be so regulated as to make it in result immaterial to each, whose property shall in the first instance have been taken, whose money spent, or whose credit pledged, for the safety of all (*d*).

This consideration, which belongs properly to the second part of this volume, that which treats of Adjustment, enables us for the present to postpone the discussion of several questions which have heretofore been less properly introduced in this place, the proper business of which is to deal with the conditions which must determine whether a loss should or should not form the subject of general average.

Is eventual
success neces-
sary?

(a) Suppose, for instance, that a sacrifice is not perfectly successful: the ship and cargo may be saved by it for the moment, but may be lost or damaged by a subsequent accident. Shall there be no contribution? or shall the cargo sacrificed be better off, by escaping the subsequent damage, than the remainder of the property? Or, in case the sacrifice has consisted of an absolute

(c) *Post*, Chap. IV. § III.

(d) *Arn. Ins.* (2nd edit.), p. 937;
(8th edit.), § 974.

outlay of money, shall the man who has advanced this money at first be left finally in a worse position than if the sacrifice had been made in kind, as well as worse off than his co-adventurers, by being left with the loss of his money and likewise of his property?

To all such questions the short answer here is: these difficulties must all be subordinated to the principle above laid down, namely, that in result no one is to be better off, nor yet worse off, than if, instead of his, some other party's property had been given for the sake of all. How this is to be done is a question of adjustment, and will be considered in its place.

One or two other preliminary questions, of a somewhat similar character to these, require a fuller consideration, for which this seems to be the most convenient place.

(b) Danger (*e*), there can be no doubt, is a necessary Danger. condition of general average. This is implied in the definition itself, whether we take the Rhodian maxim or that of Mr. Justice Lawrence or the statement in the Marine Insurance Act (*f*). The old writers have laid down that the sacrifice must not be the result of a panic fear (*g*), that it must be reasonable (*h*), and must have been made to avert "an imminent danger" (*i*); by which word "imminent," however, is apparently meant no more than "real" or "substantial," for there is no reason to suppose it was intended to discourage the judicious making of a timely sacrifice to avert a danger approaching

(*e*) *I.e.*, common danger. (See *Nesbitt v. Lushington* (1792), 4 T. R. 783; Benecke, 223; Arnould, § 910.)

(*f*) *Ante*, pp. 1, 21, 25.

(*g*) *Emerigon, Ass.*, c. 12, sect. 39, § 6. As to sacrifice properly made in fear of death, see *supra*, p. 25.

(*h*) *Anderson v. Ocean S.S. Co.*

(1884), 10 App. Cas. 107. See *Marine Insurance Act*, 1906, s. 66 (2), *ante*, p. 25.

(*i*) *Harrison v. Bank of Australasia* (1872), L. R. 7 Ex. 39, at p. 48. See also *Robinson v. Price* (1876), 2 Q. B. D. 91, 295.

in the future (*k*). I believe it cannot be shown by authorities, nor do I think it is the fact, that the law of England has gone further, in defining the *quantum* of danger, than this. Is it desirable or practicable to do more? [In the Marine Insurance Act, s. 66, it is stated that there is a general average act when the sacrifice is made in "time of peril." It is apprehended that a liberal construction must be given to these words, and that the time of peril has come when the danger is real, and so near that it would be imprudent to delay the sacrifice.]

The great utility of the rule of general average, we must bear in mind, consists in its simplifying the action of a shipmaster in those critical occasions when he has to resolve, often at a moment's notice, whether or not to incur a certain loss in order to avert the danger of a loss, as yet uncertain, but more serious (*l*). This advantage would be to a certain extent counteracted if this rule of general average were to introduce fresh distinctions, artificial and perplexing, yet which the master would be obliged at this moment of danger to bring before his mind. The extent and imminence of the danger, on the one side, and the value and probable results of the sacrifice on the other, vary in each case. Some rough equation between the two, sufficient to determine his action, he must make as well as he can. Can landsmen, however skilled in metaphysics, lay down for him any more precise rules, which at such a moment will be more likely to enlighten than to perplex his decision?

(*k*) As in the case put by Kelly, C. B. (L. R. 7 Ex. at p. 52), of a jettison to prevent being neaped in a place of shelter where no supplies could be obtained, if provisions would

fail before the next spring tides. (See also *Lawrence v. Minturn* (1854), 17 How. 100.)

(*l*) *Ante*, Intr. p. 14.

Landsmen, however, of eminence, if not of what is technically called authority, have essayed this difficult task, thinking it necessary that a hard and fast line should be laid down as to how much danger is requisite to justify an act of sacrifice. They have not, indeed, been of one mind on the question. Some have argued that the destruction of property by an act of will cannot be called a sacrifice unless there were some other alternative besides that of destroying this particular thing, or being totally lost if you do not; for, they argue with some force, this particular thing was at that moment of no value, since it must have been lost in either case. Such, though they use different formulas, seems to have been the opinion of Stevens and Benecke (*m*). This doctrine, however, has been discredited by actual judgments in our courts. For, if a cargo is on fire, and the fire can only be put out by pouring in water, it is now decided that the damage done by pouring water in is to be replaced as general average. Latterly, Mr. Mac-lachlan, the learned editor of several editions of Arnould on Insurance, propounds a doctrine which, if I under-

Alternative
theory.

(*m*) Stevens on Average, p. 7; Benecke, Ins. p. 170. This metaphysical difficulty, indeed, is only part of a still more comprehensive difficulty, which, if admissible at all, ought in consistency to be so formulated as to be fatal to all contribution to general average. At the time when the sacrifice was resolved on, forces were in existence which absolutely determined the fate of the vessel one way or the other, so that, had the sacrifice not been made, she must either have perished or not have perished. If she would have perished without the sacrifice, the sacrifice caused no loss to any one. If she would not have perished, the sacrifice

did no good to any one. The obvious answer is, at the time of the sacrifice the master did not and could not know which way the event would have been had he not made the sacrifice, and this uncertainty in his mind was a sufficient justification for his conduct, provided that his action was reasonable. This holds good equally, whether at that time there were or were not two possible ways of escape to choose between. See the Marine Insurance Act, s. 66, which only requires that the sacrifice or expenditure shall be voluntarily and reasonably made or incurred in time of peril.

stand it, resembles that of Stevens and Benecke in being self-engendered and therefore self-evident, but otherwise goes beyond and apart from it, in affirming that there must be an alternative to total loss, but yet that that alternative must be no other than the one selected by the master (*u*). Baily, again, no less strenuously contends that, in order to justify a sacrifice, there must be a moral certainty of total loss if the sacrifice be not made (*o*). In the course of my experience I have never known a case in which any of these conflicting theories have proved of the slightest practical guidance.

Of the distinction of extraordinary in kind and in degree.

(*c*) On much higher authority than any of these, but still only on the authority of a single judge or decision, rests another distinction perhaps equally artificial, and equally hard to reconcile with the broad simplicity of the Rhodian maxim or that of Lawrence, J. Disbursements, it has been said, must, in order to give rise to a claim for general average, be

(*u*) Arnould, *Ins.* 6th edit. p. 856. I am not certain that I have rightly understood this passage, which is perhaps somewhat obscure. It is as follows:—"There must be an alternative to total loss; otherwise any effort to avert it, however instinctive, is wilful and worthless, and consequently quite unrecognizable by human law. Moreover, if there be another alternative besides the one selected by the master, total loss is not so proximate" [imminent?] "as to call into operation the law which places the whole expedition in his discretion, and then clothes his exercise thereof with its authority." Can this second sentence mean that, if for example a ship is on shore, and can be got off either by jettisoning cargo or by hiring a tug, and the master elects the latter, which is in

fact the cheaper, course, and the ship is thereby got off, the cost of the tug is not properly the subject of general average? And yet, if not this, what does it mean? This, however, is distinctly at variance with the words of Brett, L. J., in *Whitcross Wire Co. v. Savill* (1882), 8 Q. B. D. 653: "It has been said that the defendant's vessel might have been scuttled" (instead of pouring in water to extinguish a fire), "but the expense of raising and repairing her would have entitled her owners to a general average contribution; and because an apparently alternative mode of proceeding existed, the captain cannot be said to have acted unreasonably."

(*o*) Baily, *Gen. Av.* 2nd edit. p. 15.

extraordinary, not merely in degree but in kind. For example, the extraordinary consumption of a steamer's coals, or the enhancement of the wages of her crew, resulting from some measure out of the common course, such as bearing up for a port of distress, for the common preservation, ought not, it has been said, to be the subject of general average; for, said the learned judge, "though the measure taken caused the disbursement to be extraordinarily heavy, it did not render it an extraordinary disbursement. . . . It does not resemble the case of a master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which not only is extraordinary in amount, but is incurred to procure some service extraordinary in its nature" (*p*).

Notwithstanding the high authority on which this dictum rests, it is difficult not to doubt whether the ground of it is tenable. In a mercantile sense, there is no such distinction between hiring extra hands and keeping the hands you have for an extra length of time, so as to enhance the wages you are to pay them, as would justify you in calling the former and not the latter a *sacrifice* or a *something given*. That this is so, is proved by the fact that in many, perhaps in most, countries this enhancement of wages is made the subject of general average, whenever the operation which has led to it is recognized as a step taken out of the common course, and taken for the common safety; and that in

(*p*) Per Blackburn, J., in *Wilson v. Bank of Victoria* (1867), L. R. 2 Q. B. 203, at p. 212. The same principle was applied by the Court of Exchequer in *Harrison v. Bank of Australia* (1872), L. R. 7 Ex. 39, where a claim was unsuccessfully

made in respect of the cost of coal bought from a passing vessel to work the donkey-engine, for the purpose of keeping down water in the hold due to the straining of the ship in a storm. (Cf. *The Bona*, [1895] P. 125 (C. A.).)

this country shipowners, it may be said without an exception, recognize it for a grievance that the like measure is not dealt out to them. The question must be more fully discussed elsewhere: all that is properly in place here is to point out that it would be contrary to the spirit of the English mercantile law, and, therefore, is not self-evidently the right course, to interpret the words "sacrifice" or "gift for all," in this definition, in any other than the ordinary mercantile sense which these words bear.

Must the
sacrifice be
the act of the
master?

§ 6a. [An important question which was not discussed by the learned author of this work, is whether a sacrifice, in order to constitute a general average act, must be ordered or at any rate authorized by the master, or whether it may be the act of the crew or of a stranger to the adventure. The master is no doubt the proper person to decide whether a sacrifice must be made; the conduct of the adventure and the care of the ship and cargo have been entrusted to him (*q*). Yet there may be exceptional cases in which a sacrifice has reasonably been made without any order from him, or even against his wish; and the question may arise in such cases whether the owner of the property sacrificed is entitled to contribution. There is not much authority in this country on the point. In *Price v. Noble* (*r*), a claim for contribution was made in respect of the jettison of the ship's guns and part of her stores and tackle, after she had been captured

(*q*) There can be no doubt, it is apprehended, that in an emergency arising at a time when the master is absent or incapacitated from acting, a sacrifice properly made under the direction of the mate or other officer who is entitled to take charge of the

ship will give rise to contribution. *Price v. Noble*, *infra*, if it be not an authority for the wider proposition in support of which it will presently be cited, is an authority to this effect.

(*r*) (1811), 4 Taunt. 123.

by a French privateer and while she was in possession of a prize master and crew. The mate of the ship and two of the crew had, however, been left on board; and in the emergency of the storm the prize crew called the mate to their aid in navigating the ship, and it was with his assistance and on his advice that the jettison was made. Afterwards the ship was recaptured, and her owner brought an action for a contribution in general average, and obtained a verdict which the defendants moved to set aside on the ground that the jettison was not ordered by the master, but by strangers to whom the respective owners of the ship and cargo had not entrusted their safety. The Court, however, held that, as the goods had been jettisoned for the benefit of the residue of the property, the shipowners were entitled to contribution. It is true that Mansfield, C. J., said in his judgment that the prize crew had consulted the mate and entrusted him with the navigation, and that the stores seemed to have been thrown overboard by his direction; but it seems clear that the mate's evidence to this effect was only used by his Lordship for the purpose of showing that the jettison was necessary. As the ship and cargo were in the possession of the prize crew, the mate's position was that of an adviser to the prize master, and the power to decide whether the sacrifice should be made or not was in the hands of the latter (*s*).

The only other reported English case in which the question under discussion was involved is *Papayanni v. Grampian S.S. Co.* (*t*). The facts were that the defen-

(*s*) There seems to have been no suggestion, even in the judgment of Heath, J. (*post*, p. 58), that as the ship and cargo had not yet been condemned by a Prize Court, the prize master might be regarded as the

person who had succeeded to the master's duty to the owners of the property to take the necessary steps for its preservation, and not as a stranger to the adventure.

(*t*) (1896), 1 Com. Cas. 448.

dants' ship, the *Birkhall*, being on fire, was taken by her master into the port of Philippeville, where the crew were unable by their own exertions to extinguish the fire. The captain of the port, to whom intimation of the state of affairs had been given, came on board, and ordered the ship to be scuttled. The master afterwards stated that in his opinion "it was the best thing for ship and cargo to scuttle the ship, though he was only obeying the orders of the captain of the port, and had nothing to do with it." The action was for a general average contribution, and as reported the judgment of Mathew, J. is contained in the following words:—

"This evidence shows that what was done was in the interest of ship and cargo. There is no evidence that there was any other motive for scuttling the ship. The captain, who had not parted with the possession of his ship, did not object. There seems to be clear evidence that he sanctioned what was done. The loss must be adjusted as a general average sacrifice."

The statement that the master "sanctioned" what was done suggests that Mathew, J. based his judgment on a finding that the master was a party to the sacrifice. From the report, however, it seems clear that the master did not propose the scuttling of the ship, that he was not consulted about it, and was powerless to prevent it. Under these circumstances his approval of the sacrifice seems only material as being evidence that the scuttling was a proper measure; and it is improbable that the learned judge intended to found his decision on the master's assent, except in so far as it was evidence of the necessity of the sacrifice.

In both these cases, therefore, the only view consistent with the facts seems to be that the sacrifice was made *by a stranger to the adventure*; and they support the conclusion that it is not essential that the sacrifice should

By the
authority
of someone
other than
the master.

have been made under the authority of the master, but that the real question is whether it was necessary for the general safety (*x*). Such a rule is consistent with the principle of natural justice on which the law of general average is said to be founded; and if this be the correct view, it follows that a sacrifice made by the crew without the master's assent, and even against his wish, may be general average (*y*), though the fact that the master was opposed to the sacrifice would be strong evidence that it was not imperative, and the clearest proof of its necessity would therefore be required.

A different rule has, however, been laid down by a majority in Supreme Court of the United States. In the case of a ship on fire, which was scuttled by the harbour authorities, it was held that "the power and duty of determining what part of the common adventure shall be sacrificed for the safety of the rest, and how and when the sacrifice shall be made, appertain to the master of the vessel, *magister navis*, as the person intrusted with the command and the safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to some one who, by the maritime law, acts under him or succeeds to his authority." Applying this rule, the Court said that a sacrifice of vessel or cargo by the act of a stranger to the adventure gives no right of contribution, and that the port authorities were strangers to the maritime adventure and to all interests included therein (*z*).

(*x*) See Carver, § 374.

(*y*) See to this effect, Benecke, p. 172; Baily, p. 21; Carver, § 374. See, also *Mouse's Case*, *infra*, p. 55; but cf. MacLachlan (4th ed.), p. 700. Phillips, § 1280, says:—"The act should be that of the master or

person in command. As a general rule, the crew have no authority, without orders, to make a jettison."

(*z*) *Ralli v. Troop* (1894), 157 U.S. 386. See also *Minneapolis, &c. S.S. Co. v. Manistee Transit Co.* (1907), 156 Fed. R. 424.

Doctrine of
general
average only
applicable to
maritime
adventures.

§ 6 (b). The doctrine of general average, as we have seen, is derived from the maritime law, and there is no authority at common law for extending it to property not engaged in a common maritime adventure in the nature of a voyage (*a*).

Thus, if a fire breaks out in A.'s warehouse on land, which contains goods belonging to B., and the goods are damaged by water used to extinguish the fire, any suggestion that B. is entitled to a contribution from A. towards his loss has never been entertained.

The case of a ship or hulk used as a floating warehouse may be thought more doubtful, but it is submitted that as the vessel is not used in navigation, there is no maritime adventure common to her and the goods which she contains (*b*), and no right of contribution between their respective owners.]

(*a*) "With regard to salvage, general average, and contribution," said Bowen, L. J., in *Fulcke v. Scottish Imperial Ins. Co.* (1886), 34 Ch. D. 234, 248, "the maritime law differs from the common law. This has been so from the time of the Roman law downward. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea." And dealing with a contract for the conveyance of goods by ship and railway, Lush, J., said: "Goods may be damaged in their transit in ship or on the railway, but

general average contribution can only arise in respect of damage on ship." (*Crooks v. Allan* (1879), 5 Q. B. D. 38, 40.)

(*b*) Cf. *European and Australian Royal Mail Co. v. P. and O. Steam Nav. Co.* (1866), 12 Jur. N. S. 909, in which the Court of Exchequer held that a ship which, though registered, had been anchored at the same place for four years and used as a coal-hulk was not a "ship" within the meaning of the Merchant Shipping Act, 1854, s. 55, which required British ships to be transferred by bill of sale. A ship is defined in sect. 2 of the Act as including every description of vessel used in navigation, not propelled by oars. See also, as regards salvage, the judgment of Lord Esher, M. R., in *The Gas Float Whitton* (No. 2), [1896] P. 42; affirmed, [1897] A. C. 374.

CHAPTER II.

SACRIFICES OF CARGO.

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§ 7. Following out the division of the subject already laid down (§ 1), we now enter upon the first division, and proceed to examine, not theoretically, but as a matter of historical fact, what losses or expenditures have authoritatively been decided by the English superior courts to be the proper subjects of general average.

In this and the next three chapters, which together make up the first division above referred to, I have laid before myself as my main purpose, so to exhibit what

has been decided in the past, that the exhibition may be serviceable towards forecasting questions not yet determined. For this purpose it is necessary scrupulously, even superstitiously, to set forth the narrative unmixed with, or at least unconfused by, speculation. The narrative, which is of course by far the most valuable portion, I have endeavoured to make clear and complete; never purposely omitting that which may make either for or against the conclusions which I myself may favour, nor giving, if I could prevent it, undue prominence to either side.

For convenience of reference, this question, What losses or expenses fall within the definition of General Average? is divided under the three main heads—Sacrifices of Cargo, Sacrifices of parts of the Ship, and Extraordinary Expenditures, which last, on account of its complexity, is yet further subdivided. Of these, sacrifices of cargo are taken first, not only because one of them, namely, jettison, or throwing overboard of cargo to lighten a ship, was by far the earliest to come under the notice of the English courts, but also because this branch of the subject is in its nature certainly the most simple. This arises from the circumstance that the sacrificing of cargo must always be an act out of the common course of a voyage, as being a thing which never takes place when the voyage is prosperous, *i.e.*, free from mishap resulting from the accidents of navigation; which cannot be said of either of the other two, since some ordinary expenditures, and some ordinary consumption of the ship's tackle and apparel in exposure to the wear and tear of a voyage under varying circumstances of weather, must always be expected by a ship-owner; so that in the latter two cases we have to distinguish between these and such losses as are properly

to be treated as sacrifices,—a difficulty from which we are exempted in dealing with sacrifices of cargo.

In the present chapter, then, we must begin with Jettison.

Jettison.

§ 8. The first, and this only incidental, mention of *Mouse's Case*. contribution towards jettison to be found in our law books is given in Coke's Reports, as occurring in the 6th year of King James I.'s reign, under the title of *Mouse's Case* (a). One Mouse, who had on board a ferryboat, for carriage from Gravesend to London, a casket and a hundred and thirteen pounds, sued one of his fellow passengers for throwing these effects into the river. The defence made was, that on the way a great tempest arose, and it was necessary to throw these and other effects over to save the lives of all on board. At the trial it was proved that, if the things had not been cast out of the barge, the passengers had been drowned; and that *levandi causâ* they were ejected, some by one passenger, and some by another; and upon this the plaintiff was nonsuit. It was resolved by the whole court that what the passengers had done, being to save their lives, it was lawful for them to do. The report continues as follows:—

“It was also resolved that although the ferryman surcharge the barge, yet, for safety of the lives of passengers in such a time and accident of necessity, it is lawful for any passenger to cast the things out of the barge, and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him for the surcharge; but if no surcharge was, but the

(a) (1609), 12 Co. Rep. 63.

danger accrued only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safeguard and life of a man, for *interest reipublicæ quod homines conserventur* Plucking down of a house, &c., and this *pro bono publico* ; *et conservatio vitæ hominis est bonum publicum*. So if a tempest arise in the sea, *levandi navis causâ*, and for salvation of the lives of men, it may be lawful for passengers to cast over the merchandizes" (b).

The Gratitude.

Master's
agency on
behalf of
cargo ;

Lord Stowell, in the case of *The Gratitude*, in 1801, speaks as follows concerning jettison :—

" Though in the ordinary state of things the master of a ship is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet, in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law ; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea as in intermediate ports, into which he may be compelled to enter. . . .

in case of
jettison ;

The case of throwing overboard parts of the cargo at sea is of the same kind. Nothing can be better settled than that the master has a right to exercise this power in case of imminent danger. He may select what articles he pleases ; he may determine what quantity. No proportion is limited ; a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved (c), it never can be maintained

may throw
overboard
entire cargo :

(b) *Mouse's Case* (1609), 12 Co. Rep. 63.

(c) As to sacrifices made "in fear of death," see *ante*, p. 25.

that he might not throw the whole cargo overboard. The only obligation will be, that the ship should contribute its average proportion. It is said, this power of throwing over the whole cannot be but in cases of extreme danger, which sweeps all ordinary rules before it: and so it is. So likewise with respect to any proportion, he can be justified only by that necessity: nothing short of that will do: the mere convenience of better sailing, or more commodious stowage, will not justify him to throw overboard the smallest part. It must be a necessity of the same species, though perhaps differing in the degree" (d).

only justification,
extreme
danger.

The following decision was in the year 1811. The ship *Brothers* was captured by a French privateer, which took out of her the captain and all the crew, except the mate and two men, and put on board a French prize crew, to carry her to the port of Marseilles. On the way a storm arose, and the Frenchmen, consulting the English mate, and with his approval, threw overboard the ship's guns, anchors, chains, and a quantity of stores from the middle deck, in order to lighten the ship. Before reaching Marseilles, she was recaptured by the mate and English seamen, with the assistance of some Italians on board, and was carried into Gibraltar. The owner of the ship made a claim on the owner of the cargo, for contribution to the jettison. This was resisted, on the grounds, first, that the jettison was made without necessity; secondly, that it was made while the ship was in the enemy's hands, and therefore while the property had passed from the owners; and, thirdly, that it was not made by the master or mariners of the ship, who alone had an implied authority to do so, but by strangers. The Court of Queen's Bench, however, decided in favour of

Price v. Noble.
(Jettison by
captors.)

Case of
jettison
improperly
made.

the claim. "The question," said Sir J. Mansfield, C. J., "merely is, whether a part of the goods being thrown over for the benefit of the proprietors of the residue, the owners of the part that is lost shall not have contribution against them. Whatever the law might be in a case where there was any evidence that the goods were grossly and ignorantly thrown over, that is not this case; for, looking on the testimony of the mate, I see that his expression was, 'We met with bad weather, and were obliged to throw these articles overboard. It was necessary to do it. I should not have thrown the stores overboard if I could have got at the cargo. It was necessary to the preserving our lives.'" And Heath, J., said: "The property was not altered by the capture; there was a *spes recuperandi*, and the property still remained in the former owners, as no condemnation had taken place. The law of average and contribution had existed for ages before the practice of insurance was known" (*e*).

Butler v.
Wildman.
(Jettison to
keep money
out of enemy's
hands, not
general
average.)

In a subsequent case, when a Spanish ship was on the point of being boarded by an enemy's vessel, which captured her without resistance, the master threw overboard a bag containing 100,000 dollars, merely to prevent such a prize falling into the enemy's hands. A claim was made upon the insurers of the dollars, and they were pronounced liable either for a loss by jettison, or at any rate for a loss *ejusdem generis* under the general words "all other losses or misfortunes." In this case, the motive for the jettison not having been to avert some danger threatening ship and cargo in common, it was not

(*e*) *Price v. Noble* (1811), 4 Taunt. 123. "A jettison to lighten the ship," says Lord Ellenborough, "is not the only foundation of a general

average; but it must arise from that, or something analogous." (*Dobson v. Wilson* (1813), 3 Camp. 480, at p. 486.)

even contended at the trial that the loss should be treated as a general average (*f*).

[Goods jettisoned still belong to their former owners, and if recovered from the sea may be reclaimed by them on payment of salvage (*g*).]

Jettison of Deckload.

§ 9. To the rule that jettison is general average there is one ancient and well-established exception: goods carried on a ship's deck, if thrown overboard, are, generally speaking, not made good by contribution, although if saved they must contribute like anything else. The reason is, that a ship's deck is generally an improper place for cargo (*h*). Where this is not so, as in some coasting (*i*) and other trades, where the carrying of deck loads is justified by custom, the exception is not applicable.

Jettison of deckload.

It may be convenient in this place to set forth somewhat fully the older authorities on this subject, on which

Older authorities.

(*f*) *Butler v. Wildman* (1820), 3 B. & Ald. 398. Two of the judges, Bayley, J., and Holroyd, J., said expressly that in order to be recoverable under a policy of insurance, the jettison need not be such as gives rise to a claim for general average.

(*g*) 2 Arnould, § 925, citing Emerigon, exii., s. 40, p. 596.

(*h*) "According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of incumbrances which ought never to have been

there, and not as a sacrifice for the common safety." Per Lord Watson, *Strang v. Steel* (1889), 14 App. Cas. at p. 609.

The carrying of cargo on deck is absolutely forbidden by many old sea laws: *e.g.*, by the decrees of the Hanseatic League (A.D. 1447), 2 Pard. 483; by the old law of Genoa (A.D. 1441), 4 Pard. 463; by the Ordonnance of Louis XIV., as under.

(*i*) Cf. the passage in the judgment of the C. A. in *Wright v. Marwood*, *infra*, p. 66, which suggests a more general right to contribution in the case of coasting voyages. See also per Walton, J., in *Apollinaris Co. v. Nord Deutsche Ins. Co.*, [1904] 1 K. B. 252, 259.

the English law has been based. The Ordonnance of Louis XIV. contains the following clause:—"§ 13. Contribution cannot be demanded for the payment of goods which were on the deck, if they are jettisoned or damaged by the jettison, reserving to the proprietor his recourse against the master; but they shall nevertheless contribute if they are saved" (*k*). On this Valin comments as follows:—"The goods cannot be on the deck except because there was no room in the ship to place them elsewhere, or through the negligence of the master, who ought to have stowed them properly; and in either case

(*k*) "*Ne pourra être demandé contribution pour le paiement des effets qui étoient sur le tillac, s'ils sont jettés ou endommagés par le jet, sauf au propriétaire son recours contre le maître; et ils contribueront néanmoins s'ils sont sauvés.*" (Ordonnance, Livre iii. tit. 8, Art. 13: 4 Pard. 333.) This principle, says M. Pardessus, is borrowed from the Consolado del Mare and the Statute of Marseilles. The passage in the Consolado to which he refers runs as follows:—"When a captain has freighted his ship to merchants, either for a lump sum or at so much per quintal, if he puts or carries merchandize on the deck without the knowledge and consent of these merchants, and if these goods placed on the deck are lost or spoiled, although they were entered on the register (log book), the merchants who have freighted the ship are not obliged to indemnify those to whom the goods thus lost or damaged belong. But the captain is bound to restore them, or pay their value to the owner of them. If, however, the shipper of these goods has agreed with the captain that he may put

them on deck, or where he pleases, then, if the loss is entered in the log book, or otherwise proved, the captain is not answerable; they may be lost or damaged for the account of the proprietors; for neither the captain nor the merchants who are on board are liable for any indemnity towards him who has put his goods on board with this condition." (Consolado, Cap. CXLI. (186); 2 Pard. 155.) The other reference is to an old Statute of Marseilles, dated A.D. 1253 to 1255, which directs that no person, master or owner of the ship, or merchants, shall voluntarily load or carry merchandize above the deck of any ship; and if he do so, and the goods so carried are thrown overboard in a storm or to avoid a cruiser, he by whose will it was so carried shall recover nothing from anyone; and it shall not be lawful for him or any others to stipulate to the contrary. (Cap. 19; 4 Pard. 275.) The framer of this statute, probably more than 600 years ago, arrived at the same conclusion in this matter as our Court of Appeal in *Burton v. English* (see below).

it is his fault, since he is no more at liberty to overload his ship than to expose the goods to the risks of such a position. . . . The reason why this article allows no compensation for goods jettisoned or damaged which were on the deck is, that since they could not fail to embarrass the manœuvres, the presumption is that they would be jettisoned before any necessity for jettison, and only because they were a hindrance to the proper working of the ship. . . . But the rules laid down in this article (§ 13) do not apply to boats and other small vessels going from port to port, where the custom is to load goods on the deck as well as below" (*l*). And Emerigon, after setting forth these comments of Valin, adds: "The recourse against the master has no place, if the goods were placed on deck with the merchant's consent." "The Statute of Marseilles," he adds, "permits the carrying on deck of horses, cattle, and wool coming from Barbary. That, however, would hold good so far as to exculpate the captain as towards the proprietors of such effects; but not at all to admit the bringing into general average of such goods if thrown overboard, when they had been laden on the deck without the consent of the other shippers" (*m*). Abbott says: "The French Ordinance in express terms excludes from the benefit of general average goods stowed upon the deck of the ship, and the same rule prevails in practice in this country. Goods so stowed may in many cases obstruct the management of the vessel, and, except in cases where usage may have sanctioned the practice, the master ought not to stow them there without the consent of the merchant" (*n*).

(*l*) Valin, Comm. tit. 8, Art. 13: 1827.

p. 621 of edit. 1829.

(*n*) Abbott on Shipping, Part 4,

(*m*) Emerigon, *Traité des Assurances*, Chap. 12, § 42: p. 63 of edit.

Chap. 10, § 3: p. 355 of 5th edit.: p. 785 of 14th edit.

Ancient
practice in
England.

In supposed conformity with these authorities, the practice in this country, followed by adjusters for a long course of years, was to exclude from the benefit of general average all cargo carried on deck: if carried without the shipper's consent, the loss by jettison or accident was made to fall on the shipowner; if with his consent, the loss from either of these causes fell on the shipper.

The party liable, shipowner or shipper, as the case might be, usually protected himself by insurance. Even where there was a well-known usage of trade to carry deckloads, as in the case of the North American and Baltic timber trades, the same rule was followed; though this, as appears from the above citation of the authorities, was evidently a mistake.

Gould v. Oliver.

This practice was disturbed in the year 1827, by the decision of the Court of Common Pleas in *Gould v. Oliver* (o). This was a claim made by the shipper of a deckload of timber, which for the general safety had been thrown from the deck of a ship bound from Quebec to London, upon the owner of the ship, for contribution to the loss as general average. It was admitted on both sides that it was the custom of the trade between those ports to carry a portion of the timber on deck. The shipowner pleaded, however, that there was no custom to treat such deckloads, if jettisoned, as matter of general average; to which it was demurred that the right to contribution was a conclusion of law necessarily following from the custom to carry a deckload. Tindal, C. J., delivering the judgment of the Court, after a full review of the authorities, decided in favour of the claim (p).

(o) 4 Bing. N. C. 134.

(p) *Gould v. Oliver* (1837), 4 Bing. N. C. 134. See also *Milward v.*

Hibbert (1842), 3 Q. B. 120, where it was decided that the underwriters on ship were liable to contribution, as

This decision was not accepted at Lloyd's and amongst the English adjusters as final; and there ensued some unsatisfactory litigation, and a change of practice, which may be pronounced even more unsatisfactory. A second action between the same parties, *Gould v. Oliver*, was commenced, the owner of the deckload now claiming from the shipowner, not, as before, a mere contribution towards his loss, but the full value of the deckload; and it was alleged as a fact that the quantity shipped on deck in this particular case was excessive and improper. On the evidence, the jury found that the stowing on deck was improper and such as to increase the perils of the navigation; whereupon judgment was given against the shipowner. In the discussion which ensued in the Court of Common Pleas, it was held that a custom to carry a deckload might be modified by a custom not to pay for it as general average in case of jettison; although, it was added, if the shipper had assented or made himself a party to that mode of stowage, he personally would be liable to pay his share (*q*). Shortly after this decision a practice was introduced amongst adjusters, which, being accepted by underwriters and shipowners, presently began to be talked of as a custom, and was distinguished from general average proper by the name of "general contribution." This practice was based on the theory, erroneously thought to follow from these two decisions, that a jettison of deckload is in no case properly the subject of general average, whatever be the custom of the trade; but that any party, be he merchant, shipowner, or underwriter, who has expressly consented to the

Practice of
"general con-
tribution."

Gould v. Oliver
(2nd case).

Practice of
"general con-
tribution."

general average, for a jettison of pigs from Ireland, carried on deck in accordance with the custom of the trade.

(*q*) *Gould v. Oliver* (1840), 2 Mann. & Gr. 208. See also *Miller v. Titherington* (1861-2), 6 H. & N. 278; 7 H. & N. 954.

shipment on deck, must in case of jettison contribute towards the loss, *as if* it were a general average (*r*). The attempt to carry this idea into practice naturally led to complications and some disputes: perhaps the principal matter of difference being the question, whether, in adjusting this *quasi* general average, the property of those who had not assented to the deck-loading, and therefore were not liable to contribute, should or should not be brought in as a nominal contributor.

All these difficulties, however, which in former editions of this book had to be discussed at some length, may now be passed over, later decisions having happily swept away this system of "general contribution."

Wright v.
Marwood.
Cattle jettisoned from
deck.

The first of these later decisions is *Wright v. Marwood*, in the Court of Appeal (*s*). The steamer *Gladys* shipped 100 head of cattle on her upper deck, to be carried from New York to Portsmouth, England, under a written agreement with the shippers, specifying that the cattle were to be carried on deck. The bill of lading contained the following clause:—"Not accountable for mortality or for any accident or injury of any kind or nature whatever." On the voyage, owing to stress of weather, the master, justifiably for the safety of the ship, threw overboard the whole of these cattle. The owner of the cattle brought an action against the shipowner for his share of the loss as "general contribution." At the trial, no evidence was given of any custom allowing cattle to be carried as a deck cargo, but the following passage from the judgment of Willes, J., in *Johnson v. Chapman* (*t*), was cited as an authority in favour of the

(*r*) Some expressions of Willes, J., in *Johnson v. Chapman* (1865), 19 C. B. (N. S.) 563, at p. 583, certainly lend a colour to this doctrine.

(*s*) (1881), 7 Q. B. D. at p. 62.

(*t*) (1865), 19 C. B. (N. S.) 563, at p. 583.

claim: "This is an action by the shipper of the cargo against the shipowner, and the charter-party contemplates a deck cargo. . . . Then, immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average" (*t*). Accordingly, the jury was directed to find for the plaintiff. On application for a new trial to the Queen's Bench Division, the judges were of opinion that the present action was not distinguishable in principle from *Johnson v. Chapman*, and refused the application. This went up to the Court of Appeal, where the whole question was fully argued. The judgment of the court (Lord Coleridge, C. J., Bramwell and Baggallay, L. JJ.) was delivered by Bramwell, L. J.

Dictum of
Willes, J., in
Johnson v.
Chapman.

"The plaintiffs," he said, "seek to recover against the defendants, ship and freight owners, a contribution as or in the nature of general average in respect of the goods of the plaintiff jettisoned for the safety of ship and cargo. It is all-important to note that the plaintiffs' goods were deck cargo, loaded on deck with their assent, on a general ship, not one chartered to them (*u*), no doubt

Bramwell,
L. J.

(*t*) (1865), 19 C. B. (N. S.) 563, at p. 583.

(*u*) These words would seem to imply a possible distinction between the cases of a chartered ship and a general ship having on board goods not belonging to the charterers; and it might well have been argued that in the former case *Johnson v. Chapman* still holds good as an authority for the position that as between charterer and shipowner there ought to be a contribution. Mr. Carver, in his book on Carriage by Sea, § 380, sets forth the law in this sense, only, however, as recording

the decisions, without himself suggesting any reason for the distinction, or, indeed, expressing any opinion upon it. It would be regrettable if a matter already sufficiently complicated should be encumbered by a further complication for which no satisfactory reason could be given. But in the subsequent case of *Burton v. English*, where, as the facts were set forth in the Queen's Bench Division, the ship was chartered for a full cargo, no attempt seems to have been made, even in argument, to rely on this distinction; and indeed the language of Cave, J., in the judgment

at a lower freight than if they had been, as we suppose they might have been, below deck; and that there is no custom alleged bearing upon the case. Now when such sacrifice is made, as was here, for the common good, as a rule it comes within general average, and must be borne proportionally by those interested. It is not necessary to say what is the origin or principle of the rule, but, to judge from the way it is claimed in England, it would seem to arise from an implied contract *inter se* to contribute by those interested. To this rule there is an exception, viz., deck cargo jettisoned is not entitled to general average contribution. Here, again, the reason or principle is perhaps not important: so is the law. The reason, amongst others, however, assigned is, that deck cargo is a dangerous cargo, certain to be jettisoned before any other, and liable to be unduly jettisoned, owing to the facility of doing it, when cargo under hatches would not be. So that, if we treat general average as matter of implied contract, that ought not to be implied where risk and benefit are not in fair proportion; if as a matter of positive law that is the reason which caused the exception. If the goods jettisoned are loaded on deck without the shipper's consent, the shipowner is liable to the goods owner; if with his consent, still other cargo-owners will not be. To this exception, however, there are two exceptions, which perhaps resolve themselves into one, viz., that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade, and perhaps also from the port.

Exceptions :
coasting
voyages and
custom of
trade.

Concerning
"general con-
tribution."

"It is said that there is a further exception, viz., where by agreement with the shipper the cargo is shipped on deck. We are of a different opinion." And then the learned judge proceeds to give the reasons of the Court for arriving at this conclusion. "There is nothing," he says, "in the older authorities to warrant that doctrine. No reason can be given for the claim as of general average. Whatever may be the agreement between the shipowner and the owner of the deckload, the other cargo-owners are no parties to it, nor bound to enquire into it or notice it, as they are bound to take notice of a custom. Nor is it established by authority." He shows this by a detailed criticism of the previous cases. Finally, he considers the claim disproved, by reason of the absurd conse-

(10 Q. B. D. at pp. 430, 431) shows (See, however, the discussion of this that, had the attempt been made, question, *infra*, p. 72 *et seq.*) the Court would have negatived it.

quences which would ensue, whether we did or did not bring in the under-deck cargo as a nominal contributor (*x*).

Burton v. English, likewise in the Court of Appeal, carries the principle laid down in *Gould v. Oliver* (*y*) a step further, establishing that where cargo is carried on deck under a custom of the trade, a jettison of it must be treated as general average, notwithstanding a clause in the charter-party declaring that the deckload is to be "at merchant's risk." In this case the ship was chartered to carry a full cargo of timber from a port in the Baltic for London, and the charter-party contained the clause, "The steamer to be provided with a deckload, if required, at full freight, but at merchant's risk." It was proved that there was a custom or usage in such voyages to carry a deckload of timber. In the Queen's Bench Division it was decided that the words "at merchant's risk" exempted the shipowner from liability to contribute towards the loss of deck-cargo lawfully jettisoned (*z*).

Burton v. English.
Effect of special clauses.

The reasons given by Cave, J., who delivered the judgment of the Queen's Bench Division (Cave and Day, JJ.), were, in substance, that there was no reason why the shipowner should not, if he pleased, introduce into the bill of lading clauses modifying the rights to general average; and that it was difficult to attach any other meaning to the words "at shipper's risk" than that the shipper was to take the risk of jettison, since the shipowner was already protected by the general terms of the charter-party. This judgment, however, was reversed in the Court of Appeal. The grounds on which

Cave, J.

(*x*) *Wright v. Marwood* (1881), 7 Q. B. D. 62. It will be noticed that throughout the arguments and judgment in this case no notice was taken of the clause in the bill of lading set forth above.
(*y*) (1837), 4 Bing. N. C. 134.
(*z*) *Burton v. English* (1883), 10 Q. B. B. 426.

the learned judges went are even more deserving of attention than the decision itself. Brett, M. R., said:—

Brett, M. R.

“It is obvious that this” [the clause above cited] “is a stipulation in favour of the shipowners, for in order to earn a larger freight they may require part of the cargo to be deck cargo, and then it is to be at the merchant’s risk. . . . The stipulation is in favour of the shipowners, and is in restriction of their liability under their contract to carry. The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made. Now by what right is it that the owner of cargo can make the shipowner liable to contribute in respect of its loss? If the liability is in consequence of any act of any of his servants for which the shipowner would have been liable but for this stipulation, then it follows that the defendants are freed from liability. I should say that this stipulation would cover any act of the master or crew which being done by them as servants of the shipowner would otherwise make him liable; it therefore covers the case of improper jettison, also a loss caused by a collision or stranding owing to the negligence of the master or crew. Does it, however, cover this claim for contribution? How does such a claim arise? In theory it arises from an act done by the master of the ship, not as the servant of the shipowner, but as the servant of the cargo-owner, a relation which is imposed on him by the necessity of the case. It arises by reason of a voluntary sacrifice by the cargo-owner for the benefit of the ship and freight, and not from any act done by the shipowner at all. By what law does the right arise to general average contribution? Lord Bramwell, in his judgment in *Wright v. Marwood (a)*, considers it to arise from an implied contract; but although I always have great doubt when I differ from Lord Bramwell, I do not think that it forms any part of the contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. If this be so, the liability to contribute

General rule for construing special clauses in case of doubt.

Basis of general average, master’s agency on behalf of party whose property is sacrificed.

Right to general average not a matter of contract, but of natural justice.

(a) (1881), 7 Q. B. D. 62, at p. 67.

does not arise out of any contract at all, and is not covered by the stipulation in the charter-party on which the defendants rely. I therefore disagree with the decision of the Divisional Court in this case. The difficulty which my brother Cave felt as to the meaning of the words in the charter-party does not arise, because the acts of the captain with reference to properly or improperly jettisoning part of the cargo are not both done by him in the same capacity: one is done by him as the agent of the cargo-owner, and the other as the servant of the shipowner. For these reasons I think that the liability to general average contribution is not covered by any words of the contract in the charter-party, and consequently that the defendants are liable" (b).

In properly or improperly jettisoning, master is agent for different principals.

The other learned judges (Baggallay and Bowen, L. JJ.) concurred; both, substantially, on the grounds that the clause must be interpreted most strictly against the shipowner, and that the terms of it were not clear enough to absolve him. Bowen, L. J., on the matter of principle in difference, if we may call it so, between Lord Bramwell and the Master of the Rolls, as to the origin of the right to general average, took a somewhat middle ground, for reasons which we have already set forth (c).

To constitute a custom of the trade to carry cargo on deck, much more is required than the occasional or even frequent carrying of deckloads. Cotton, for example, used often to be carried on the decks of steamers between ports in America and this country. This was done, sometimes by express agreement with the shippers, sometimes without the shipper's consent or even knowledge, the shipowner in the latter case, according to the general understanding for many years, taking the risk upon himself. An attempt was made to establish that this practice amounted to a custom of the trade, such as to entitle a deckload so carried, if properly jettisoned, to

Dixon v. Royal Exchange Shipping Co.

What is a custom of trade. Carrying cotton on deck of steamer not the custom of trade between America and England.

(b) *Burton v. English* (1883), 12 Q. B. D. 218, at pp. 219—221.

(c) *Ante*, § 3, p. 30.

be treated as general average. The action was brought by the owner of the deckload against the shipowner, for the full value of the deckload: the shipowner contended that he was not liable for more than his share of the loss, treated as general average. The case went to the Court of Appeal, and was there decided against the shipowner. Brett, M. R. (afterwards Lord Esher), said, first, that if this action were to be treated as an action upon the bill of lading, the defendant was liable, because the goods were not delivered in Liverpool, never mind how, whether they were thrown overboard or fell overboard, and the defendants had contracted to deliver them in Liverpool, subject to certain exceptions, which exceptions are to be taken as struck out of the bill of lading if the cargo was improperly stowed on the deck; as it would be, unless it could be shown that the plaintiff had impliedly given leave to stow them there. How could this be shown?

"It is suggested," said the learned judge, "that there is a practice which it must be taken that they knew. Now the only practice which it can be taken in law that they impliedly knew (that is, taken that they knew, although they did not) is a general practice; so general and universal in the trade and at the port from which these goods were taken, that everybody who ships cotton on board a ship at New Orleans for England must be taken to know that his goods probably will, or may probably be put on deck. . . . To say that there is a practice, or to say that there is a frequent practice, is only to say that it is sometimes done, leaving it open that as often, or oftener, it is not done. Such evidence as that is not evidence to go to a jury, upon which they would be justified in finding a general usage." He then proceeded to show how the case would stand, wholly independent of the bill of lading. "Wholly independent of the bill of lading," continued the learned judge, "if goods are loaded on deck, unless there is a general custom that they should be so loaded, so that everybody who puts his goods on board that ship ought to know, or must be taken to know, that other people's goods, if not his, are loaded on deck, then the captain has no authority to bind anybody by the jettisoning of those goods

which are on deck, so as to make a liability for general average contribution. If that is so, these goods were thrown overboard by the captain . . . under such circumstances that he had not the authority of the plaintiffs to throw them overboard so as to entitle the plaintiffs to a general average contribution, and therefore the goods are not to be taken as thrown over by the authority of the plaintiffs at all. If they are not thrown over by the authority of the plaintiffs, then there is no question of general average contribution which can be raised at all; and the whole question comes back to being, what are their rights under the bill of lading? and under the bill of lading, as I have said, by reason of what has happened they are entitled to claim the value of the goods from the shipowners" (d).

The law of deckload jettison, then, may now be summed up as follows:—A jettison of goods carried on deck is not made good by contribution, except where there is a general custom of trade, in the particular voyage, to carry deckloads. Such a custom there is with regard to the timber trade from the Baltic and British North America. Even here, however, it is to be noted that wherever restrictions upon such deckloading are imposed by a British statute, and are violated, as by carrying too large a deckload, or more than is permitted for the particular season of the year, no claim can be made for a jettison of what was thus unlawfully laden. The occasional or surreptitious carrying of deckloads, however frequent in particular voyages, as in the case of cotton in steamers from America, does not constitute a custom of the trade. Where there is no custom to carry deckloads, there is no contribution, but the loss by jettison must fall on the owner of the goods, if he has agreed to that mode of stowage, or, if not, on the shipowner. The shipowner in either case must bear his own

Summary of
law of deck-
load jettison.

(d) *Dixon v. Royal Exchange Shipping Co.*, Court of Appeal, May 18, 1885; confirmed in House of Lords (1886), 12 App. Cas. 11, a similar

decision was given by the Court of Appeal in *Newall v. Royal Exchange Shipping Co.* (1885), 33 W. R. 868.

loss of freight on the goods jettisoned. And these rules cannot be modified by clauses in a bill of lading, or certainly not if there be anything ambiguous about such clauses.

Locomotive
on deck.

Cargo which is always carried on deck, because there is no other place where it can be carried—*e.g.*, a locomotive carried in a coasting steamer—must, it is conceived, so long as it is fit to be carried at all, be treated as in its proper place, or as if it were customary so to carry it, and therefore if jettisoned must be allowed as general average.

The editors' view as to jettison of deck cargo.

[The editors have reproduced without any alteration the learned author's discussion of the question when the jettison of deck goods gives rise to contribution. They cannot, however, agree with his conclusion that the only case (except that suggested in the last paragraph) in which there is contribution, is where there is a custom to carry the goods on deck. *Johnson v. Chapman*(*e*) is a strong authority to the contrary. In that case the whole cargo was carried under a charter-party contract which expressly provided for a full cargo, including a deck-load. Part of the deck cargo was necessarily jettisoned during the voyage.

The cargo-owner claimed for a contribution, while the shipowners contended that the jettison was, under the circumstances of the case, only a particular average loss and not a loss entitling him to a contribution, the cargo jettisoned being, they said, practically in a state of wreck. They do not seem, however, to have disputed the right to contribution, on the ground that the cargo was laden on deck (*f*). Willes, J., delivering the considered judg-

(*e*) (1865), 19 C. B. (N. S.) 563;
35 L. J. C. P. 23.

(*f*) See Sir George Honyman's
argument for the cargo-owner as

ment of the Court of Common Pleas, first dealt with the question of wreck (*g*), and then continued:—

“In this case there is a deck cargo. And the first observation naturally would arise upon its being a deck cargo, and upon the exception with regard to deck cargoes, but that is taken out of the case most effectually by reference to the charter-party. This is an action by the shipper of cargo against the shipowner; and the charter-party contemplates a deck cargo. It is not suggested that there is any statute to make a deck cargo illegal; therefore it seems something more than custom to have deck cargoes. I think it was from Quebec; but it is not necessary to refer to any custom affecting the voyage, because, according to the contract between the parties, there was to be a deck cargo. Then, immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo, lawfully there by the contract of the parties, it becomes subject to the rule of general average.”

The question in *Wright v. Marwood* (*h*) was a different one, as the vessel was a general ship carrying the goods of various parties; and the Court of Appeal held, as we have seen, that there was no right of contribution, even from the shipowner, by agreement with whom the goods were carried on deck. But the right to contribution when there is only one cargo-owner who has agreed with the shipowner for the carriage of a deck-cargo seems clearly to have been recognized in the judgment of the Court of Appeal delivered by Bramwell, L. J., although he preferred not to give it the name of general average. He begins by pointing out that it is all-important to note that in *Wright v. Marwood* the ship was not chartered to the claimant (*i*).

reported in the *Law Journal* report, and per Bramwell, L. J., in *Wright v. Marwood*, 7 Q. B. D. at p. 69.

(*g*) See *infra*, p. 119.

(*h*) (1881), 7 Q. B. D. 62.

(*i*) See *ante*, p. 65.

Afterwards, in discussing *Johnson v. Chapman*, he says:—

“That was not a case of general average. The plaintiffs had chartered the defendant's ship (*k*), loaded the whole cargo, part of which by the charter was to be, and was, deck cargo, and were held entitled to a contribution from the ship, and with reason. They were not seeking it from other cargo-owners, but from the shipowner, who shared the benefit and ought in reason to share the risk of the deck cargo.”

Again, after quoting the passage from the judgment in *Johnson v. Chapman*, which we have already set out, he remarks:—

“The learned judge should be understood as speaking in relation to the subject-matter. It was not a claim for general average, as against any other than the shipowner. It was a particular claim against him, and is said to be subject to the ‘rule’ of general average. If Mr. Justice Willes had said that it could have been maintained against other cargo-owners, had there been any, it would have been wholly extra-judicial, for there were none. But he did not say nor mean to say so. For he says: ‘The deck cargo was within the contemplation of the parties,’ which would not be true of other cargo-owners. The case, then, was not one of general average. It was as though the plaintiffs were owners of such cargo, and A. owner of other cargo, and A. had agreed to contribute if deck cargo was jettisoned.”

Finally, in considering whether the plaintiff was entitled to what has been called a “general contribution” (*l*) against the shipowners, he distinguishes *Johnson v. Chapman* from the case with which he was dealing as follows:—

“In the case of *Johnson v. Chapman*, the plaintiffs and the defendant got all the benefit from the jettison; not so here. In

(*k*) He ought to have said:—“The plaintiffs’ ship.” The shipowners were plaintiffs.

(*l*) *Ante*, pp. 63, 64.

that case all subject to general average was brought into the account; here it would not be."

In *Burton v. English* the sole question for determination was whether the words "at merchant's risk" excluded the liability to contribute for the jettison of deck cargo. It was not disputed that but for this clause the liability would have arisen, as there was a custom to carry a deck cargo in the particular trade. *Johnson v. Chapman* was not cited, and even if, as Mr. Lowndes says (*n*), the language of Cave, J., shows that the Divisional Court would have negatived an attempt to rely on it, which is by no means clear, such an opinion could have no weight against the considered judgment of the court in *Johnson v. Chapman*, supported, as we have shown it to be, by the opinion of the Court of Appeal in *Wright v. Marwood*. It is, therefore, submitted that the legal authorities establish the rule that where the whole cargo belongs to the same owner, there is a right of contribution for jettison of cargo carried on deck by express agreement between him and the ship-owner, unless the right be clearly negatived by the contract.

In *Strang v. Scott* (*n*), shortly after the last edition of this work appeared, Lord Watson, in delivering the judgment of the Privy Council, considered the exceptions to the rule of contribution for general average. He said that the exception in the case of deck cargo does not apply either "(1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship" (*o*). He thus accepts

(*n*) *Ante*, p. 65, note (*u*).

(*u*) (1889), 14 App. Cas. 601, 609.

(*o*) With reference to this dictum it is submitted in the latest editions

the principle that there is a right to contribution when all the parties to the adventure have agreed to the carriage of a deck cargo. If this be the correct principle, the case where there are only two parties who have expressly contracted for a deck cargo is an *à fortiori* one.

As a matter of practice, jettison of deck cargo is not treated by adjusters as general average in this country; unless the carriage of a deck cargo on the particular voyage is sanctioned by custom.

The rule (No. 9) of the Association of Average Adjusters, dealing with this point, is as follows:—

“The jettison of a deckload carried according to the usage of trade and not in violation of the contracts of affreightment is general average.

“There is an exception to this rule in the case of cargoes of cotton, tallow, acids and some other goods.”

The practice, therefore, is in accordance with the view expressed by Mr. Lowndes on this subject.

The reason for the rule which disallows contribution for the jettison of deck cargo can hardly apply to an inland voyage by river or canal; for on such a voyage it is difficult to suppose that the deck is an improper place for cargo (*p*). Therefore, even without evidence of custom, it is apprehended that in the unlikely event of a jettison of deck cargo on such a voyage for the general safety there will be a right to contribution.]

of Arnould on Marine Insurance, § 921, that the other owners “must also have consented under such circumstances as to justify the inference that they intended to take upon

themselves the liability to contribute in case of jettison.”

(*p*) See the judgment of Walton, J., in *Apollinaris Co. v. Nord Deutsche Ins. Co.*, [1904] 1 K. B. 252.

Cargo in Deckhouses.

§ 10. It has been questioned whether cargo in the poop or forecastle, or in deckhouses, or other spaces covered in above the maindeck for the purpose of holding cargo, can be treated as below deck. If there is a difficulty about this, it arises from the manner in which ships are now measured for tonnage. Such spaces may be built in with the frame of the ship, and measured in with her tonnage, which, in theory, represents her capacity for carrying cargo; and, when due allowance has been made for crew space and the like, it has not unreasonably been supposed that cargo in the remainder of a ship's tonnage space should be treated as in the proper place for cargo. Lord Esher, M. R., however, expressed himself very energetically in opposition to this view, declaring that anybody who knows what a ship is must know that that part of a ship in which goods are ordinarily loaded is that part of the hold of the ship "which comes up to the deck and not above the deck." His lordship appeared to be willing to receive evidence of custom on the point, so that perhaps the question may be regarded as still an open one (*q*). It is rather a nautical than a legal question. Amongst adjusters, the practice, up to the time of *Dixon v. Royal Exchange*, used to be, to treat a jettison from structures built in with the ship's frame and measured in with her tonnage as being on the same footing with a jettison from below the hatches.

Cargo in
deckhouses,
&c.

Jettison from fault of Cargo.

§ 11. Supposing that the danger which has necessitated the jettison has arisen from what may be styled

Jettison
resulting from
fault of cargo.

(*q*) *Dixon v. Royal Exchange Shipping Co.*, Court of Appeal, May 18, 1885.

the fault of the cargo, how does this circumstance affect the right to contribution ?

Old theory as to "cause of danger."

A theory was formerly set up, and for some time was acted on in the practice of average adjusters, that there can be no contribution for the sacrifice of an article which was itself the cause of the danger which

Heated hemp.

rendered its sacrifice necessary. If, for example, a cargo, such as hemp, were to heat from being shipped in a damp state, and were jettisoned from fear of fire, there should, it was contended, be no contribution, since the loss would really be caused by the vicious quality of the article itself (*r*). Or, again, if the cargo were in a state of wreck, *i.e.* in a position, owing to some accident to the cargo itself, inconsistent with the proper navigation of the ship, and were jettisoned on that account, the same rule should apply, because the cargo was the cause of the danger (*s*).

State of wreck.

This theory has been rendered untenable by decisions in our courts.

Johnson v. Chapman.

Above theory not applicable to cargo displaced or damaged by accidents of navigation.

In *Johnson v. Chapman* (*t*), a ship carrying a deckload of deals met with extremely bad weather on three occasions, of which it may suffice to mention two. The first time, a heavy sea knocked the deckload adrift, and threw a quantity of the deals against the pumps, so as to prevent their being worked ; presently, however, the crew succeeded in getting this deckload to its place and securing it again. The second time, seas flooded the deck, and the deckload was again broken adrift and

(*r*) In *Boyd v. Dubois* (1811), 3 Camp. 133, where the question was of liability under a policy of insurance, Lord Ellenborough said: "If the hemp was put on board in a state liable to effervesce, and it did effervesce, and generate the fire that consumed it, upon the common prin-

ciples of insurance law the assured cannot recover for a loss which he himself has occasioned."

(*s*) *Baily, General Average*, pp. 56-8.

(*t*) *Johnson v. Chapman* (1865), 19 C. B. (N. S.) 563.

knocked against the pumps on both sides; whereupon, to prevent damage to the pumps and bulwarks, and to enable them to work the pumps, and for the safety of ship and cargo, the captain threw overboard a quantity of the deals. A claim was made by the owner of the deckload against the shipowner, for contribution towards the jettison. This claim was resisted, on the ground that the deals, when jettisoned, were in a state of wreck; and it was admitted, in the agreed case, that hitherto it had been the practice of average adjusters Admitted practice of adjusters. not to allow as general average the jettison of deals in a state of wreck. The court, however, decided that the jettison in this case was properly a general average. "The cargo," it was pointed out, "had been secured once before when adrift, so that it clearly was not in a state of wreck, in the sense of having become lost property, which they could not recover or make use of if they recovered it. . . . The danger was caused to all, both ship and cargo and crew, by the storm. . . . The special danger caused to and by the timber was only a circumstance of the common peril to which the whole adventure was exposed" (*u*).

Willes, J., who delivered the judgment of the court, *Willes, J.* intimated that a distinction should be drawn, in the case of heated hemp, between heating by a peril insured against, and heating by reason of an inherent defect of the cargo. As to this he says:

"In order to make jettison the subject of general average contribution, there must be common danger. It must be a maritime peril, and it must be common to the whole adventure; which would exclude some of the cases which Mr. Cohen very ingeniously put, of a subject-matter that had within itself the elements of destruction which developed themselves during the storm; as, for instance,

(*u*) *Johnson v. Chapman* (1865), 19 C. B. (N. S.) 563, at p. 583.

cotton which was brought on board in a damp state bursting out into a flame, and being thrown overboard. You cannot say there is a common danger, but a peculiar danger from the fault of the person putting it on board" (x).

*Pirie v.
Middle Dock
Co.*

*Watkin Wil-
liams, J.*

Limitation of
above dictum
to case where
claimant to
blame.

In another case, where a cargo of coal took fire owing, as was admitted, to spontaneous combustion, and by reason of water thrown upon the coal to extinguish the fire there ensued a loss of freight to the shipowner, the question having been raised whether this loss should be treated as general average, the above dictum of Willes, J., was cited as an authority against the allowance; but Watkin Williams, J., said: "In that case cotton had been shipped in a damp state, and in consequence, and without external accident, burst into a flame, and was on that account thrown overboard, and it was held that the merchant had no claim to contribution on account of the jettison. The application of the principle of that case to the present involves a complete fallacy. All that that case decides is, that if the owner of the interest sacrificed was himself in fault, and was the cause of the danger which necessitated the sacrifice, he must bear the loss himself, and could not throw it as a general average on the whole adventure; or, as it has been expressed in one of the decisions, he cannot take advantage of his own wrong" (y).

This decision establishes that where the danger, to avert which the sacrifice was made, has resulted from the fault or *vice propre* of the cargo, an innocent party whose property has been sacrificed may be entitled to contribution as general average. The above theory

(x) 19 C. B. N. S. at p. 581.

(y) *Pirie v. Middle Dock Co.* (1881),
4 Asp. Mar. Law Ca. 388, at p. 391.
It may be noted that in this case no

allowance for the loss of the *coals*
jettisoned was claimed. See *post*,
p. 88 *et seq.*

concerning the "cause of danger" may now, therefore, apparently be narrowed to this, that one who improperly ships cargo in a condition not fit for carriage cannot recover as general average a loss which is really caused by, or by the discovery of, its improper condition.

[This conclusion is confirmed by the recent case of *Greenshields v. Stephens*. In that case the claim was for a contribution in respect of damage done, by pouring water into the hold, to a cargo of coal, some of which had taken fire through spontaneous combustion. The Court of Appeal held that the fact that the peril was brought about by the inherent vice of the cargo did not prevent the cargo-owner from recovering, unless his conduct in shipping the cargo was wrongful or negligent; and this judgment was affirmed by the House of Lords (z).]

Damage incidental to Jettison.

§ 12. Damage which is incidental to a jettison, so that the jettison cannot be made without incurring it, must be regarded as part of the loss by jettison, and included in the general average; e.g., holes cut in the deck, or bulkheads or bulwarks stove in, in order to get

Damage incidental to jettison:

cutting holes in deck, or the like.

(z) *Greenshields v. Stephens*, [1908] 1 K. B. 51; [1908] A. C. 431. The claim was only for the damage done to the coal which had not been on fire, and in the Court of Appeal, Kennedy, L. J., seems to have guarded himself against laying down a rule applicable to that part of the cargo which had been on fire through spontaneous combustion. No such limitation is suggested in any of the other judgments. Apart from any question of inherent vice, there is a practice not to allow the damage done to bales or packages which have

been on fire. (See *infra*, p. 86.)

In *The William J. Quillen* (1910), 175 Fed. R. 207, the district judge distinguished *Greenshields v. Stephens* on the ground that the cargo might have been prepared so as to be quite safe from the risk of spontaneous combustion, whereas in *Greenshields v. Stephens* the shipowner knew that the cargo was necessarily liable to spontaneous combustion; but it does not appear from the report that the shipper knew that the cargo was improperly prepared, or that his conduct in shipping it was negligent.

Damage to
goods by
opening
hatches.

at the cargo or throw it over. So if goods are damaged by reason of the opening of the hatches to throw cargo overboard, from seas which break over the deck, all such damage is properly and in practice made the subject of general average, being the necessary consequence of the measure for the common safety. This rule is as old as the Roman law, and may now be regarded as universally accepted (*a*). The same principle would apply to damage done by chafing or breakage of packages, or otherwise from the derangement of stowage consequent on a jettison; *e.g.* if the cargo consisted of barrels, well secured in their places while the hold was full, but which could not be prevented from shifting after a portion of the cargo had been thrown out; [or if goods were lost or damaged in consequence of having been brought on deck in order to get access to less valuable goods for the purpose of jettison (*b*)].

Derangement
of stowage.

Damage done in quenching Fire.

Damage in
quenching
fire.

§ 13. If a ship is on fire, and the fire is quenched by pouring water into the hold, or by scuttling the ship in shallow water, or by filling the hold with steam, is the damage done by this means to the cargo properly the subject of general average contribution? It certainly comes within the definition. It is a voluntary sacrifice of a part for the preservation of the remainder.

Former
practice of
adjusters.

For a considerable number of years, however, it had been the practice of English average adjusters not so to treat it. The origin of this practice, and the reasons on

(*a*) Digest ad leg. Rhod. See Appendix A. Damage done to cargo by water going down a hole made in the deck from cutting away a mast has been treated in the American

courts on the same principle as general average. (*Maggrath v. Church* (1803), 1 Caines, 196; Phillips, § 1286.)

(*b*) Benecke, p. 213.

which it was founded, are not now to be traced with any certainty. It is not very ancient; in 1835, Stevens discusses the question as one not yet settled, and gives it as his opinion that such damage should be treated as general average (*c*). He suggests a doubt, however, in saying:—“When claimed as a general average, it is objected to on the ground that the damage done to the goods is secondary and accidental, and not primary and intentional (as in cutting away a mast, &c.), which it ought to be to establish such a claim” (*d*). This perhaps means that the water is poured in for the purpose of quenching the fire and not of wetting the goods, and is not aimed at any particular package. On whatever ground it may have rested, however, we find that the practice of excluding such claims from contribution was completely established before the year 1856. Bailly speaks of it as a settled rule. “In defence of this practice,” he says, “no valid reason can be urged. It is based on an erroneous idea that a general average cannot arise when the degree of danger is so great that it amounts to a moral certainty of total loss, and on a fanciful distinction between the degree of danger existing in cases of fire and the degree existing when a vessel is on her beam ends, or on the point of foundering,—a distinction which the ingenuity of argument may draw, but which will not bear the test of common sense” (*e*).

Until the year 1873, then, the practice of adjusters in case of fire was this: If a hole was cut in a ship's deck, in order to pour water down it to flood the cargo and quench the fire, the cost of repairing the deck was replaced in general average, but the damage done to the

(*c*) And see, to the same effect, Benecke, p. 243.

(*d*) Stevens on Average, 5th edit. 42.

(*e*) Bailly, General Average, p. 82.

goods by the water poured down was not replaced. If a hole was cut in a ship's side in order to scuttle the ship for the same purpose, the damage done to the ship by cutting the hole was allowed as general average, but the damage done to the goods by the water that flowed in through the hole was not allowed. This practice held good only until it was challenged in a court of law.

*Stewart v.
West India
and Pacific
S. S. Co.*
The above
practice
theoretically
condemned.

A parcel of 180 serons of bark had been shipped at Santa Martha on board the steamer *Venezuelan*, bound for London, under a bill of lading containing the clause, "average, if any, to be adjusted according to British custom." While the *Venezuelan* was at Santa Martha, loaded and about to sail, a fire broke out in her forehold, which was only extinguished by pouring in water down the hatchways, and through holes cut in the deck, and by cutting a hole in the side of the ship and filling her fore-compartment with water. By the water thus poured or let into the ship, 152 of the 180 serons of bark were destroyed. The owner of it claimed contribution from the shipowner, as general average. The question was tried on an agreed case, in which it was admitted that if these measures had not been taken, the remaining cargo would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. It was admitted also that "it has been the practice of British average adjusters, in adjusting losses, to treat a loss occasioned by water in the manner above described as not a general average loss."

Quain, J.

The judgment of the Queen's Bench Division was delivered by Quain, J., who said:—

How the case
should be on
principle.

"The first question argued before us was, whether the loss in question was a loss which properly formed the subject of a general average contribution, according to the law of England. . . . On these facts we are clearly of opinion that the loss was, according

to the general law, properly the subject of a general average contribution. It was a voluntary and intentional sacrifice of the bark, made under the pressure of imminent danger, and for the benefit, and with a view to secure the safety, of the whole adventure then at risk. No case has been cited in which the exact point to be decided has arisen in our courts; but we have been referred to an American case in which the question was considered and decided. That case is *Nimick v. Holmes* (f), decided in the Supreme Court of Pennsylvania. There Lowrie, J., in delivering the judgment of the court, says: 'Guided by the light of the rule and its instances, we feel constrained to say that when a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of the vessel in order to get at it, is general average. The danger is a common one, and the cost of the remedy must be common. It makes no difference how the water is applied, by the aid of fire-engines on the land, or in the form of steam, or by scuttling the vessel. . . . It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water, in order to save the rest.' . . . We quite agree with this conclusion, and if the present case depended wholly on the common law applicable to general average losses, we think the plaintiffs would be entitled to recover. . . .

American
law.

"The question in this case, however, is whether the parties have not, by the words used in the bill of lading, made this practice [of British average adjusters] a part of their contract, for if so they are bound by it, though the practice may be, according to the best opinion, vicious and unreasonable. . . . As it appears on the face of the case, and also from the authorities above cited, that a practice prevails amongst British average adjusters not to allow a loss like the present as a general average loss, we can only construe the expression, British custom, as intended to apply to that practice, as the mode of adjusting the average by which the parties have agreed to be bound. It follows, therefore, that, as the parties have agreed to make this custom a part of their contract, the case must be decided in accordance with the custom, and the result is that our judgment must be for the defendants. It is to be hoped, however, that in future there will be no difference between law and custom on this point, and that average adjusters will act on the law as now

Practice here
made part of
contract.

declared, and that bills of lading will also be framed in accordance with it" (g).

Change of
practice.

The effect of this decision was such as might have been expected. The practice at once disappeared. The Association of Average Adjusters, at their next annual meeting, passed a resolution, "That damage done by water poured down a ship's hold to extinguish a fire be treated as general average." This was next year (in 1874) modified by another, viz., "That goods in a ship which is on fire, or the cargo of which is on fire, affected by water voluntarily used to extinguish such fire, shall not be the subject of general average if the packages so affected be themselves on fire at the time the water was thrown upon them" (h). And these two resolutions have ever since formed the basis of our practice.

Stewart v.
West India Co.
in Exchequer
Chamber.

Stewart v. West India Co. was carried to the Exchequer Chamber, where, while the result of the judgment as based on the practice was affirmed, some doubt

(g) *Stewart v. West India and Pacific S.S. Co.* (1873), L. R. 8 Q. B. 88.

(h) This rule is consistent with an old rule of practice, which lays it down that if a bale or package is thrown overboard because it is on fire, the owner of it is entitled to no compensation.

"If water be thrown down the hatches to stop the progress of an accidental fire in the hold . . . this must be conceived to be done with the double intention of saving the articles which have already caught fire from utter destruction, and of extricating the vessel and rest of the cargo from imminent danger. The effect of the water upon the former goods is therefore particular average: it is not an injury, but a real advantage done to them." (See this point

discussed, *infra*, p. 93.) "But the damage done by the water to other goods is, I conceive, of the nature of a general average, upon the same principle on which the occasional damage done to goods during a jettison is considered as such." (Benecke, *Ins.* p. 243.)

How, if a package which is on fire be thrown overboard? This cannot be said to be done for the benefit of the bale itself. Must we inquire whether it was possible to save it? It might have been possible, yet not reasonably practicable, having in view the danger its presence on shipboard might, under the circumstances, expose the ship and cargo to. This question was started, *arguendo*, in *Shepherd v. Kottgen* (1877), 2 C. P. D. 585, at p. 586.

was thrown on the principle laid down by the court. "If it were necessary in this case," said Brett, J., "to determine whether the destruction of merchandize by water thrown upon it in the course of throwing water to extinguish a fire which is burning other merchandize in the same ship is the subject of general average, we should desire further time to consider a subject which is no doubt of great importance, and upon which we know of no direct authority in the law of this country" (*i*).

In the following year a case was tried at Nisi Prius, before Cockburn, C. J., to determine whether there existed a custom at Lloyd's excluding from general average damage to cargo by scuttling (or voluntary stranding) to put out a fire. "It is quite clear," said his lordship, "that this [alleged] custom is in opposition to, and in derogation of, the law of the land relating to insurance, and to the matter of average as between the shipowner and the owner of the goods. It would be general average according to the law of the land but for this custom, and therefore the custom militates against, and derogates from, the law of the land; and when a person sets up a custom of that sort in derogation of the law, he is bound to prove it, and to prove it fully to the satisfaction of the jury." The jury found that the custom was not made out (*k*).

Achard v. Ring.

Effect of custom.

In *Schmidt v. Royal Mail Co.* (*l*), and in *Aspinwall v. Schmidt v. Royal Mail Co.*

(*i*) *Stewart v. West India and Pacific S.S. Co.* (1873), L. R. 8 Q. B. 362.

(*k*) *Achard v. Ring* (1874), 31 L. T. (N. S.) 647.

(*l*) (1876), 45 L. J. Q. B. 646. In this case the shipowner set up the defence that by the bill of lading he was exempted from liability for loss by fire; and, moreover, that by

statute 17 & 18 Vict. c. 104, s. 503 [see now the Merchant Shipping Act, 1894, s. 502], "No owner of any sea-going ship . . . shall be liable to make good any loss or damage that may happen without his fault or privity . . . of or to any goods, merchandize, or other things whatever, taken in or put on board any such ship by reason of any fire happening

Pirie v. Middle Dock Co.

Merchant Shipping Co. (m), it was decided in the Queen's Bench Division that damage by water poured into a cargo to extinguish a fire is the subject of general average. The same conclusion was come to by Watkin Williams, J., in *Pirie v. Middle Dock Co.*, in a very learned and elaborate judgment. A fire broke out on board the ship *Attila*, bound for Singapore with a cargo of coals, owing, as was admitted, to the spontaneous combustion of the coal. Some fifty tons of coal was thrown overboard, water was poured into the cargo continuously for three days, and the ship was taken into Batavia for safety, where the fire was quenched by pouring in more water while the cargo was taken out. Owing to the damaged state of the coal from the sea water, it was found necessary to sell the whole of it at Batavia. The result was, that the shipowner lost his freight, while the owner of the coals, receiving the proceeds freight free, suffered no loss, but on the contrary made a profit by the mishap. The shipowner thereupon claimed from him, as general average, contribution towards this loss of freight, occasioned by the means taken to extinguish the fire. The owner of the coals disputed his liability. On his behalf it was argued that the pouring in of the water was not a voluntary sacrifice, but was done to preserve as much of the coals as could be saved; that the cargo was practically lost

on board." But his exemption in this matter, it was pointed out, corresponds with his ordinary exemption from "the accidents of navigation," and does not touch his liability to contribute towards a general average. The judgment was given by Blackburn and Lush, JJ. The same defence was set up in *Greenshields v. Stephens*, [1908] A. C. 431, and was

held by the House of Lords to be untenable. It has also been held in the United States Courts that the statutory exemption of a shipowner in respect of damage by fire does not apply to cases of general average. (*The Roanoke* (1893), 59 Fed. R. 161.)

(m) Not reported; referred to in *Schmidt v. Royal Mail Co.* (1876), 45 L. J. Q. B. 646.

past redemption, and that what was preserved was in the nature of salvage or wreck. To this it was replied, that if this principle were to prevail, there would be an end to general average altogether; for it would be equally applicable to a jettison, and the risk of foundering from a leak might be as great as that of destruction by fire. W. Williams, J., gave judgment ^{H. Williams, J.} in favour of the shipowner's claim. The question, he said, was to be tested by applying the maxim of the Rhodian law, *Omnium contributione sarciatur quod pro omnibus datum est*. As to the objection, that the fire arose from spontaneous combustion, that is, from the fault of the cargo, it was to be observed that the present claim was not made on behalf of the owner of the cargo, but, on the contrary, was by the shipowner upon him, so that the fault of the cargo was no answer (*n*). Next, as to the argument that the cargo was already practically lost past redemption, the learned judge, after a careful examination of the authorities and principles by which the question must be governed, arrived at the conclusion that the danger affected the whole, ship as well as cargo, and that the operation was successful in saving the ship and a large part of the cargo, while it caused the destruction of the freight; consequently that the freight, being given for all, must be replaced by contribution (*a*).

The learned judge pointed out that one of the conditions of a general average is that "it must be a real sacrifice, and not a mere destruction or casting off of that which had become already lost, and consequently of no value." In illustration of this he cited an American decision, where a vessel laden with lime was hauled out

There must
be a real
sacrifice.

(*n*) *Ante*, § 12.

(*o*) *Pirie v. Middle Dock Co.* (1881),
4 Asp. Mar. Law Cas. 388.

into the stream and scuttled, because the lime was on fire. The lime was destroyed at once, and the ship was saved; but it was held that the ship did not contribute for the lime, because the lime could not possibly be preserved, and the ship was saved by only hastening its destruction (*p*).

*Whitecross
Wire Co. v.
Savill.*
Full argu-
ment of the
general
question in
the Court of
Appeal.

In spite of this consensus of judicial authority on the general question, extending over a period of about ten years, it appears to have been thought worth while to carry the question up to the Court of Appeal, in order to have the whole matter argued afresh, unhampered by precedent. The iron ship *Himalaya*, bound for Wellington, New Zealand, had arrived at that port, and had landed the greater portion of her cargo, when a fire broke out on board, which was extinguished by pouring water into her hold. The ship was much damaged by the fire; the skin was charred, and the timber of the deck was charred about half through; she was in imminent peril until such time as the water had put out the fire. If the water had not been got under speedily the whole of the woodwork about the ship would have been consumed. Among other portions of the cargo damaged by the water poured in was a quantity of iron wire belonging to the plaintiffs. There was some evidence that this wire had been rendered unmerchantable by the fire; but it was proved that it was injured by the water poured down into the hold. The fire might have been extinguished by removing one of her plates and thereby scuttling her, but much damage would have been done. On these facts the owners of the wire made a claim on the shipowners for contribution towards their damage,

(*p*) *Nimick v. Holmes* (1855), 25 Pennsylv. 366; cited 4 Asp. Mar. Law Cas. 392. The decision in this

case was confirmed in the case of *Crockett v. Dodge*, 3 Fairf. 190; *infra*, p. 94, note (*z*).

as general average, and Pollock, B., gave judgment in their favour. This was appealed against.

In support of the appeal it was argued, 1st, that Arguments. there was no sacrifice, because the wire, at the time the water was poured on it, was in fact worthless, as it would have been destroyed by the fire; 2nd, there was no common danger to the whole, for the ship was built of iron, and so could not be destroyed, and was in shallow water and could have been scuttled and raised again after the fire was out; 3rd, the master did no more than his ordinary duty in pouring water down, since he resorted only to the ordinary method of extinguishing a fire; and, 4th, at the time of the fire the common adventure was at an end, for the voyage was over and a large part of the cargo was already safe on shore. The liability to a general average contribution, it was contended, is an obligation, not of common law, but of maritime law, and ceases when the adventure is finished, that is, when the carriage of the goods to the port of destination is completed (*q*).

Lord Coleridge, in the course of the argument, observed: “*Atwood v. Sellar* (*r*) certainly shows that any consequence flowing from a general average act is the subject of a general average contribution, although it happens afterwards, and, therefore, is separated in point of time from the general average act” (*s*).

The judgment of the court was unanimous against the appeal.

(*q*) A further point was raised in the course of the argument, viz., that the wire, at the time when the water was poured on it, had become unmerchantable through damage by fire; but the court said that this question had not been raised at the

trial, and declined to take it into consideration for the purposes of their decision.

(*r*) (1880), 5 Q. B. D. 286.

(*s*) *Whitecross Wire Co. v. Savill* (1882), 8 Q. B. D. 653, at p. 658.

Lord Coleridge.

"It must be shown," said Lord Coleridge, "that an imminent peril existed, and that the master deliberately and for the sake of preserving the adventure sacrificed that in respect of which contribution is claimed. . . . I am unable to come to the conclusion that this is not a case of general average; the facts seem to me to fall within the definition of a general average act. . . . No authority is against our decision. In *Atwood v. Sellar (s)*, the judgment of this court was delivered by Thesiger, L. J., who points out that the practice of average adjusters professes to follow legal principles and authority. The principle is laid down in the following general terms (p. 289): 'The principle which underlies the whole doctrine of general average contribution is, that the whole loss immediate and consequential caused by a sacrifice for the benefit of cargo, ship, and freight should be borne by all.' . . . On general principles nothing ought to make us hesitate to bring the case before us within the rule of general average. . . . The fourth point urged on behalf of the defendants is somewhat extraordinary. . . . The voyage probably had come to an end, and it may possibly be that the liabilities of the underwriters had ceased; but the liabilities of the shipowners upon the bills of lading were still existing, and this shows that the maritime adventure was not at an end. . . . The rule which we lay down, of course, applies only so far as the plaintiffs' wire was damaged by water; for there must be an intentional sacrifice. But no distinction between damage by water and damage by fire was made at the trial, and the case was rested on the point whether goods damaged by pouring water upon them are the subject of a general average contribution" (t).

Allowance
only extends
to damage by
water.

Brett, L. J.

Brett, L. J., said :

"If there is an imminent danger, and if the captain sacrifices part in order to save the rest of the adventure, a claim for a general average contribution arises. It has been argued that there must be danger of an immediate total loss of the whole adventure: some phrases in *Arnould on Insurance* appear to justify this contention; but I think this argument has been pushed too far on behalf of the defendants. . . . It has been argued that no total loss of the ship would have occurred in the present case, because she was built of iron and could not be destroyed by fire; but it was proved that the fire had got a strong hold upon her, and it would have burnt

(s) (1880), 5 Q. B. D. 286.

(t) *Whitecross Wire Co. v. Savill* (1882), 8 Q. B. D. 653, at p. 659.

her woodwork, such as her deck and masts, and also her sails; if the fire had not been extinguished, she would have been brought almost to the state of a wreck. It has been said that the defendants' vessel might have been scuttled; but the expense of raising and repairing her would have entitled her owners to a general average contribution; and because an apparently alternative mode of proceeding existed, the captain cannot be said to have acted unreasonably. It is said that it was within the captain's ordinary duty to extinguish the fire; still it was his duty to carry the goods safely, and in extraordinary circumstances he becomes in effect the agent for all parties. As I have before said, there must be an intentional sacrifice: here the captain intentionally inundated the cargo, and thereby necessarily damaged it by water. I wish to point out that if the ship had been improperly flooded, the owners of the cargo would have a right of action against the shipowners for all the cargo injured. Similarly if, under the pretence of preserving the adventure, the cargo is jettisoned without due cause, the owner will have a right of action against the shipowners for the whole of his loss. All the circumstances seem to me to exist which constitute a general average loss" (u).

Damage by scuttling would be general average.

[If any doubt could possibly have remained after these decisions as to the right to recover in general average for the damage done by pouring water into the hold to extinguish a fire, it is set at rest by the judgment of the House of Lords in *Greenshields v. Stephens*(x); and the same principle obviously applies in the case of other reasonable steps, such as scuttling (y), taken for the same purpose.]

At present the second of the rules of practice of the Association of Average Adjusters dealing with the question of damage done by water in extinguishing a

Practice as to packages touched by fire.

(u) *Whitecross Wire Co. v. Savill* (1882), 8 Q. B. D. 653, at p. 662.

(x) [1908] A. C. 431. Similarly it has been held in the United States, that damage to cargo caused by flooding a stranded steamer, in order to prevent a total loss from pounding

on a reef, was general average. (*Pacific Mail S.S. Co. v. N. Y. H. & R. Min. Co.* (1896), 74 Fed. R. 564.

(y) So held in *Papayanni v. Grampanian S.S. Co.* (1896), 1 Com. Cas. 448. See also *Achard v. Ring*, *supra*, p. 87.

fire, in virtue of which we exclude from general average the damage done by water to a bale or package which the fire had touched when the water was poured on it, has not been either confirmed or overthrown by a legal decision. It is based on the argument of common sense, that the water which in the same act damages and saves a package already kindled cannot be said to do that package, on the whole, any harm (z).

[Yet the loss by fire of the rest of the cargo might have been inevitable if the water had not been poured over it; and the argument that the water had on the whole done no harm might equally well be advanced in such a case with regard to that part of the cargo. If the package which has been on fire has retained some value, and the damage done by the water can be separated from that done by the fire (a), it seems more in accordance with principle to allow the former. This view is supported by a passage in Mr. Justice Channell's judgment in the case of *Greenshields v. Stephens*. Referring to No. 3 of the York-Antwerp Rules, the learned judge said:—

“That exception that no compensation shall be made for

(z) The rule observed in practice in the United States is the same. (Gourlie, *General Average*, p. 157.) And in the case of *Slater v. Hayward Rubber Co.* (1857), 26 Conn. 128, it was held that where goods on fire are jettisoned, no contribution in general average is due. See also the case of *Crockett v. Dodge*, 3 Fairf. 190, where a vessel was scuttled in order to extinguish a fire in her cargo of lime. The lime was destroyed in consequence of the scuttling, but the ship was saved. It was held that no contribution was due in respect of the lime. See, however, Appendix V., *post*, p. 746. No. 3 of the York-Antwerp Rules, 1890, is an extension of the rule, and provides also that

no compensation shall be made for damage to such portions of a bulk cargo as have been on fire. In *Greenshields v. Stephens*, [1908] 1 K. B. 51, the C. A. rejected the contention that all the contents of one hold constituted only a single “portion” of a bulk cargo, and the judgment was affirmed, [1908] A. C. 431.

(a) In an American case, where it was impossible to distinguish between the damage done by fire and that done by steam turned into the hold to extinguish the fire, it was held that a claim for contribution had not been made out. (*Reliance Mar. Ins. Co. v. N. Y. & C. Mail S.S. Co.* (1896), 77 Fed. R. 317.)

damage to such portions of the ship and cargo or separate packages as have been on fire, seems to me to mean that in those cases the portions that have been on fire are to be treated as wreck, as it is called, in this case, that is to say, it is something the value of which has already gone, and which cannot, therefore, be considered to be sacrificed for the general good; but, of course, if there were not this rule, there would be a question in each case of fact whether in the particular case the damage had gone to the extent in which you could say it was wreck within the meaning of that word. If it is, there is no sacrifice" (b).]

Cargo burnt as Fuel.

§ 14. Another sacrifice of cargo, now recognised as the subject of general average, consists in the using it upon emergency as fuel for the engines of a steam-ship, when this is needed for the common safety; with this proviso, that the fuel originally supplied for the engines, at the outset of the passage, was not insufficient. On this subject there have been the following decisions in our courts:

Cargo burnt as fuel, how treated.

In the case of *Harrison v. Bank of Australasia* (c), where not indeed cargo, but a quantity of spare spars belonging to the ship, were burnt as fuel for her donkey-engine, the coal having run short; the four judges of the Court of Exchequer were equally divided on the question whether the value of the spars should be brought

Harrison v. Bank of Australasia.

(b) Shipping Gazette, 29th Dec. 11906.

(c) (1872), L. R. 7 Exch. 39. Kelly, C. B., and Bramwell, B., held that this loss was properly the subject of general average. "The captain," said Kelly, C. B., delivering the judgment of both, "prudently and properly sacrificed some spare spars, and saved the ship and cargo. There seem to us here all the ingredients of

a case of general average: peril of the seas imminent, certain loss in a short time unless something not to be anticipated should intervene, and a sacrifice of the property of one for the benefit of all." Martin and Cleasby, BB., held that the loss was not general average, on the ground that there was not such an imminent danger of total loss as was requisite to constitute a general average.

into general average; and the junior judge withdrawing his judgment, judgment was given for the plaintiff.

In the subsequent case of *Robinson v. Price*, a question substantially the same was decided in the Court of Appeal.

*Robinson v.
Price.*

The ship *John Baring*, bound with timber from Quebec for London, was and had for several years been supplied with a donkey-engine, adapted for the loading and discharge of cargo and ballast, and also for pumping the ship, in aid of the ship's hand pumps, when required. Such engines were often, though at that time not universally, used in that trade. At the time of sailing the ship had five tons of coal on board, which was admitted to be a sufficient supply of fuel for all purposes of the ship while at sea, other than pumping, for a much longer voyage than that from Quebec to London. While at sea the ship fell in with bad weather, and sprung so bad a leak that she could hardly be kept free by constant pumping. For this purpose it presently became necessary to have the pumps worked by the donkey-engine, and as the supply of coal threatened to run short, the captain ordered some of the ship's spare spars, and a portion of the cargo, to be used with the coal to keep up the fire of the donkey-engine; by which means the ship was eventually brought safe into port. The questions for the court were, whether the burning of the spare spars, and whether the burning of the cargo, were to be replaced as general average. The judgment of the court was delivered by Lush, J., who said:

Lush, J.

“The circumstances under which the ship's spars and the cargo were used as fuel for the donkey-engine satisfy all the conditions of a general average claim. The peril was imminent; the sacrifice voluntary, in the sense of being an act of will on the part of the master; it was, in the emergency, necessary in order to save the

ship from sinking, and was, of course, made with a view to the safety of the whole adventure—ship, freight, and cargo. *Primâ facie*, therefore, the case of the plaintiff is made out. But it was objected that, as the ship was furnished with a donkey-engine, adapted and intended, in case of need, for pumping as well as for loading and discharging the cargo, the owner was bound to provide sufficient fuel for its use; that if this had been done the resort to the spars and cargo would not have been required; that it was not done, and, therefore, the use of the spars and cargo was not a necessity brought about by the perils of the sea, but a necessity occasioned by his own default. Although we cannot accede to the proposition in its terms, we entirely accede to the principle that underlies it. We think that a shipper of cargo is entitled, in time of peril, to the benefit not only of the best services of the crew, in order to save his goods, but of the use of all the appliances for that purpose with which the ship is provided. It follows that, where a ship is fitted up with auxiliary steam pumping power, it is the duty of the owner to make some provision for supplying the engine with fuel. Not that he is bound to have on board enough for every possible emergency, but he is bound to have a reasonable supply, having regard to the nature of the voyage, the season of the year, the quality of the cargo, the condition of the ship, and what experience has shown to be prudent to provide against under those conditions. If he fails to do so, he cannot call upon the owners of cargo to contribute towards that reasonable supply. That would be to make them pay for that which he ought to have provided at his own expense. If, under such circumstances, the opportunity occurs during a time of peril of buying coals from a passing steamer, we think it clear that he could not charge their cost as an extraordinary expenditure entitling him to general average. That statement of the case not being so explicit as it might have been upon this point, we thought it right to send it back to the learned counsel who settled it between the parties, to find from the evidence he had taken one way or the other upon this question. He has returned it to us, with a statement as follows: ‘I find that the *John Baring*, when she left Quebec, had on board a reasonable supply of coal for the donkey-engine for pumping purposes.’ This finding concludes the defendants. The *primâ facie* claim to general average contribution is not displaced by any default on the part of the owner, and our judgment must be for the plaintiff” (d).

Duty of steamer to have coals enough on setting out.

Case of buying from passing steamer.

Same case on
appeal.

This decision was affirmed upon appeal. Lord Coleridge said: "In my opinion the judgment of the Queen's Bench Division was perfectly right. The facts are now stated so distinctly as to preclude all argument. It is impossible to say that under the circumstances the sacrifice of the spars and cargo was not general average." Bramwell and Brett, L. JJ., concurred (*e*).

Conclusion.

There seems to be no distinction in point of principle between burning cargo to feed a ship's donkey-engine, and burning it to feed the ordinary working engines of a steamer, provided the two conditions, of imminent danger if the engines are not worked, and of a sufficient supply of fuel at the outset, are the same in both. What is a sufficient supply, so that it may with confidence be said that there has been no default on the part of the owner, must be determined by the tests laid down in the above judgment. Account must be taken of the engines' daily consumption, and of the maximum ordinary length of the voyage, and to the amount thus determined should be added, it is conceived, a reasonable margin to cover uncertainties, according to what prudent owners usually do in the particular trade (*f*). Supposing

(*e*) *S. C.* (1877), 2 Q. B. D. 295.

(*f*) In a case tried at Nisi Prius, where a quantity of coffee had been burnt as fuel for a steamer, and it was alleged on the one hand that the fuel originally supplied for the steamer was insufficient, and on the other that there had been a sufficient supply at first, and that the coffee was burnt for the benefit of the whole venture, Keating, J., directed the jury that "there was no obligation cast upon the shipowner to have more than a reasonable and ordinary supply of coal on board, having regard to the character of the voyage, and the

character of the weather that was to be expected. . . . If they should be of opinion that there had been no error committed in respect of the coaling and the navigation of the ship, and also as to her condition to make the voyage, then they would consider whether what had been done was not for the benefit of all parties interested in the ship and cargo." The jury, being unable to agree, were discharged. (*Shand v. Ash*, Mitchell's Mar. Reg. 1872, p. 242.) If it be necessary for purposes of coaling to divide a voyage into "stages," the vessel must load a reasonably suffi-

that the original supply has been sufficient, and that from stress of weather or other accidental cause the coal runs short, it still would have to be proved that the ship and cargo would be in danger if the engines were not kept going. The motive of saving time would not be sufficient. If she could complete her voyage under sail, the mere advantage to the owners of the cargo and of the ship from completing it more quickly under steam would not justify the destruction of a portion of the cargo. But if a steamer were unmanageable under canvas alone, or could not be kept off a lee-shore unless by the aid of her engines, or for similar reasons would be in imminent danger unless her engines could be kept going, the cargo necessarily sacrificed for the purpose ought certainly to be replaced as general average. And this is now the established practice (*g*).

Other Sacrifices of Cargo.

§ 15. When cargo is discharged from a ship under such circumstances that the act of discharging it is a general average act, or an extraordinary act performed for the common preservation of ship and cargo, and when such discharging necessarily entails damage or partial loss upon the cargo, such damage or loss falls within the definition of general average, and in practice is so treated (*h*).

Damage to
cargo in
discharging.

cient quantity of coal at the commencement of each "stage" in order to comply with the warranty of seaworthiness. (*The Vortigern*, [1899] P. 140 (C. A.); *Greenock S.S. Co. v. Maritime Ins. Co.*, [1903] 2 K. B. 657 (C. A.)) See also Marine Ins. Act, 1906, s. 39, sub-s. 3.

(*g*) See York-Antwerp Rules, No. 9.

(*h*) Thus, a loss of cargo in barges,

into which it had been discharged to enable the vessel to make a port of refuge, should be allowed as general average. See Abbott, 5th edit. p. 346, cited with approval by Cresswell, J., in *Hallett v. Wigram* (1850), 9 C. B. 580, 608, and by Mathew, J., in *McCall v. Houlder* (1897), 2 Com. Cas. 129, 132. See also per Wills, J., in *Royal Mail Steam Packet Co. v.*

Discharging
when ship
ashore.

There are circumstances in which the discharging of cargo can scarcely be distinguished from a jettison. For example, if a ship is stranded she may be in extreme danger unless she can be lightened sufficiently to float her off by the next rise of tide; for which purpose a portion of the cargo may be thrown out, perhaps upon the sand or beach, not intending its destruction, but with the hope that it may be fetched into safety by carts or boats from the shore. Or it may be that the only way in which the cargo can be put ashore is by dragging it through surf, or floating it in rafts. Or it may have to be landed through heavy rains, with no means of protection, or the only place where it can be deposited may be a bank of mud. In cases of this kind, where exposure of the cargo to great risk or even certainty of damage is deliberately adopted to avert the greater evil of extreme danger to the entire property, all damage or loss of cargo which occurs in consequence of such exposure, and in spite of reasonable care to prevent it, is clearly the subject of general average. It is perfectly analogous to damage by water going down when the hatches are opened for jettison, or when water is poured upon the cargo to extinguish a fire; that is to say, this or that particular damage was not intended or aimed at, but, for the common safety, a measure was resorted to which naturally and indeed inevitably produced these results (*i*).

English Bank of Rio (1887), 19 Q. B. D. 362, 372; Arnould, § 924.

(*i*) See *McCall v. Houlder*, *infra*, p. 102. It may be well distinctly to point out that what is here said is only applicable where the discharge itself is properly a general average act. In cases of wreck, where the cargo is discharged really or princi-

pally for its own preservation, there is no ground for claiming as general average the damage it may sustain in the process. Nor, indeed, in such cases is the expense of discharging properly to be treated as general average. It may often be difficult to distinguish between the two classes of cases. Since the damage and the

Or again, when a ship, being in a leaky state or needing repairs, is for the common safety taken into a port of refuge, and it is necessary to discharge the cargo there, then, if the discharging is for the common safety of all, or is a consequence of the bearing up to repair, and is on one of these, or indeed any other, grounds properly treated as a general average act, any damage or loss of cargo which necessarily follows from so discharging it is properly to be treated as general average loss (*k*). Hence the rule of practice, now in force in the Association of Average Adjusters, is expressed as follows: "Whenever the cost of discharging cargo is general average, all loss or damage necessarily arising to cargo therefrom shall be allowed in general average" (*l*).

Discharging
at a port of
refuge.

It is not, perhaps, at first sight obvious why the discharging of cargo in a port of refuge should necessarily lead to its being damaged. There are three principal reasons: the cargo may have to be discharged with unusual haste, as when the ship is leaky; or in a place where it is not usual to unload so large ships or cargoes of that kind, so that there are not the proper appliances; or, lastly, the cargo may be of such a nature, *e.g.*, coals, that it cannot be landed without suffering loss by breakage or the like, so that to discharge it at a port of refuge, in addition to the port of destination, is simply doubling the ordinary wastage. In any of these cases, what the

Why damage
should follow
discharging.

expense must stand or fall together, the necessary damage indeed being properly a portion of the cost of discharging, it will be convenient to consider the whole subject at large in one place, which must be in Chapter IV., when we have to discuss the treatment of Salvage Expenses.

(*k*) It is otherwise where the cargo

has never been in danger, but has to be discharged to enable the ship to be repaired after sustaining a particular average loss. (*Hamel v. P. & O. Steam Nav. Co.*, [1908] 2 K. B. 298, Lord Alverstone, C. J.)

(*l*) This is a change, based upon conviction of its reasonableness, from a former practice to the contrary.

discharging actually costs is, the money outlay *plus* the inevitable damage to cargo (*ll*).

[A curious case in which a claim was made for damage to cargo is the following: A ship having sustained damage to her propeller, put into a port of refuge, where the cargo, which was perishable, could not be stored. In order to repair the propeller with the cargo on board she was tipped, and in consequence of the tipping part of the cargo was damaged by sea-water. Mathew, J., held that the tipping was resorted to for the preservation of the ship and cargo and was a general average act, and that the damage to the cargo being incidental thereto, although not contemplated, was a general average loss (*n*).]

Damage by
voluntary
stranding.

§ 16. Damage to cargo necessarily resulting from voluntary stranding should be the subject of general average. This subject, however, is fully discussed in the following chapter.

Damage from
cutting away
mast.

§ 17. Damage done to cargo, in consequence of the cutting away of a mast, or other general average sacrifice of some part of a ship,—as, for example, if the mast when cut away breaks below the partners, so that water gets down through the opening and wets the goods (*n*); or if a similar mischance occurs, as is very likely, in cutting away an iron mast, which is hollow, and has openings below through which seas shipped on deck may

(*ll*) Allowance is also made in practice for cargo pilfered during a forced discharge, so far as such loss might reasonably be anticipated. Damage to cargo merely through delay at a port of refuge is not, however, allowed, whether it be left on the vessel or stored on shore, nor is

a loss by fire or other accident, while the cargo is stored, made good.

(*m*) *McCall v. Houlder* (1897), 2 Com. Cas. 129.

(*n*) So treated in the United States. (*Magrath v. Church* (1803), Caines, N. Y. R. 176.)

reach the cargo,—is evidently allowable as general average. It is perfectly analogous to damage occasioned by seas shipped while the hatches are open for jettison.

§ 18. Sometimes, though rarely at the present day, cargo is sacrificed by being given in kind as salvage for the entire property. Such a sacrifice must, of course, be treated as general average (*p*). Cargo given as salvage.

§ 19. More frequently, cargo is sacrificed by being sold or pledged in order to raise funds in a port of refuge, when the owners of the ship and cargo are unable or unwilling to supply the sum needed for the purpose of releasing the ship from her obligations at such port, and thereby enabling her to proceed on her voyage. Cargo sold or pledged to raise funds.

This case, however, is involved in complications which properly belong to a larger subject, viz. the treatment of loss and expense incurred in order to raise funds required for general average purposes. This it will be convenient to deal with later in a separate chapter.

§ 19A. [Mr. Lowndes does not discuss the question whether goods which are not shipped as cargo must be contributed for if they are sacrificed, though he lays down the rule that any kind of property which is preserved from destruction must contribute unless there be some special reason for exempting it (*q*). Arnould stated that the jettison of goods for which there is no bill of lading gives no claim to contribution (*r*). He only cited foreign authorities, and probably had in his Sacrifice of goods not included in the cargo.

(*p*) On the same principle, where cargo is voluntarily given up to pirates by way of composition, the sacrifice is a subject for contribution.

(*Hicks v. Palington* (1590), Moore, 297.)

(*q*) *Post*, p. 375.

(*r*) Arnould, 2nd edit. p. 904.

mind the case of a clandestine shipment in fraud of the shipowner, in which case the disallowance of contribution may well be justified (*s*). With this exception, however, there is no valid reason for refusing contribution on the ground that no bill of lading has been given for the goods, if it be proved that they were sacrificed or damaged by a general average act.

Sacrifices of
passengers'
and seamen's
effects.

The question whether passengers are entitled to contribution for the sacrifice of their effects has not been litigated in this country, and instances of such sacrifice seem to have been too rare to give rise to any settled practice (*t*). It may be argued that as passengers' baggage is not made to contribute when saved, it ought not to be contributed for when sacrificed. The argument founded on the want of reciprocity does not, however, appear to the editors to be convincing, and they agree on this point with the view admirably expressed by Brown, D. J., in an American case, in which he held that there is a right of contribution for passengers' baggage (*u*). His decision on this question, the only one raised on appeal, was affirmed by the Circuit Court of Appeals (*x*). In the absence of English authorities, the following lengthy quotation from his judgment may be justified.

"Reciprocity," he said, "is undoubtedly the ordinary rule in

(*s*) Most of the foreign codes do not allow contribution for the sacrifice of goods, unless the captain has given a bill of lading for them or declared them in the manifest, and one of the authorities cited by Arnould is sect. 420 of the French Code de Commerce, which contains a provision to this effect.

(*t*) A case occurred recently in which considerable damage was done to passengers' effects in extinguish-

ing a fire on board a steamer, and the damage was adjusted as general average, assessed upon the baggage of the other passengers in the baggage hold, as well as on the ship, cargo, and freight. The contributions of the uninsured passengers were, however, paid by the ship-owners.

(*u*) *Heye v. North German Lloyd* (1887), 33 Fed. R. 60.

(*x*) (1887), 36 Fed. R. 705.

general average. It is, however, rather a circumstance in the usual application of general average than an indispensable part of the principle upon which the right of general average is founded. That principle, as before stated, is the simple equity that a loss voluntarily incurred for the sake of all shall be made good by the contribution of all. This, for the most part, involves reciprocity of right and obligation, and by the old law *all* were bound to contribute. But special reasons might exist why a class of articles that share in the common benefit might not be called on to contribute, and such a case would form an exception merely to the universality of one branch of the rule, without providing any just reason why similar articles in another case should not be paid for when they had been voluntarily sacrificed as a means of saving all the rest. A few such exceptions are well established, on which no reciprocity exists. Thus, cargo on deck must contribute, if saved, though it may have no claim to compensation, if jettisoned. It is the same with goods put on board without the master's knowledge, and without a bill of lading. . . . On the other hand, the clothes of seamen, munitions of war, and, usually, the provisions of the ship for use on board do not contribute, though they are paid for, if sacrificed. The reasons assigned for excepting seamen's clothes is, not only the favour accorded to seamen by the modern law from their necessitous condition, and in order that they may not hesitate in sacrificing what is necessary through any fear of personal loss, but on account of their necessary exertion in connection with the special peril. Provisions do not pay, because contribution is based upon the value of articles at the close of the voyage, and provisions are for consumption during the voyage. If, therefore, it were settled law in this country that passengers' baggage should not contribute, that would not necessarily determine that such articles should not be contributed for when sacrificed for the common safety. The grounds of exemption must be considered, or the right to compensation be determined as an independent question." He cited foreign codes to prove that passengers are entitled to contribution for their baggage, and then continued: "This right seems never to have been anywhere questioned, and it is plain that such articles, when sacrificed for the rest, are within the principle of general average as much as any other property on board."

He also came to the conclusion that passengers' baggage in the baggage compartment is liable to con-

tribute, but it is clear that, even if he had formed a different opinion on that part of the case, his decision that passengers' baggage must be contributed for would not have been affected. On this point the editors submit that his judgment is correct.

It can hardly be doubted that the master and crew are entitled to contribution for the sacrifice of their effects, and their right is generally recognized by the foreign codes. The "reciprocity" argument has little or no weight in their case; for their exemption from contribution may not only be explained on the ground that they have done their share towards the preservation of the ship by their personal efforts (*y*), but also justified as regards the wearing apparel, which usually constitutes the whole of their property, on the ground that it must be considered as attached to the person (*z*).]

Sacrifices of
freight.

§ 20. To complete this portion of the subject, it is necessary to say a few words concerning sacrifices of freight. As a general rule, the sacrifice of cargo carries with it as a consequence the loss of the shipowner's freight. It may be said that the beneficial interest on every package of cargo on board a ship is vested partly in the shipowner, in respect of the freight on it for which he has a lien, and the remainder only in the merchant, in respect of the surplus of its value beyond the freight. Each party is of course equally entitled to compensation for what he loses by the sacrifice (*a*).

(*y*) See *infra*, p. 375; per Brown, D. J., in *Hege v. North German Lloyd*, *supra*.

(*z*) See *infra*, p. 378.

(*a*) When there had been no sacrifice of cargo for the general safety, but it was necessarily sold by the master at a port of refuge because it

was heated and could not be carried to its destination, Bigham, J., and the Court of Appeal held that the consequent loss of freight was not a general average loss. (*Iredale v. China Traders' Ins. Co.*, [1899] 2 Q. B. 356; [1900] 2 Q. B. 515.)

It has been sometimes thought that as what is in fact sacrificed by a jettison, or any similar general average act, is simply so much specific merchandise, it can never be allowable, by any subdivision of this sacrifice between shipowner in respect of freight, and merchant in respect of this surplus value, to allow more in the aggregate than the total gross value of the cargo ; or, to put the same difficulty in another form, to allow that the total amount made good for cargo destroyed, added to the total received for cargo not destroyed, should exceed what the total would have been had there been no sacrifice. This certainly seems most reasonable. And yet cases do arise in which it seems impossible, without injustice, to avoid committing this seeming absurdity.

In the case of *Fletcher v. Alexander* (b), for example, though the point does not appear in the reports, the facts were these. The ship, bound from Liverpool to Calcutta, grounded shortly after sailing, and was only got off by throwing overboard substantially her entire cargo of salt, after which she returned to Liverpool for repair. One half the freight on the salt had been absolutely prepaid. The shipowner, being discharged from his engagement with the charterer by the loss of the salt, took on board a second cargo of salt, belonging to another shipper, and carried it to Calcutta. The result was, that the owner of the ship made a clear profit ; but the owner of the salt, in addition to losing the cost price of his salt, lost the half-freight he had prepaid on it. This half-freight was allowed as general average ; and, although the adjustment was in other respects disputed, and the whole matter was adjudicated on in the courts, this allowance of freight was not questioned. Here was a

(b) (1868), L. R. 3 C. P. 375.

case in which the shipowner's gain of freight could not be brought in, in diminution of the merchant's loss; so that, in the aggregate, what was allowed for the jettison of the salt was more than the real value of the salt at Liverpool, the place where the values were to be taken, and more than it would have been but for the special terms of the charter-party.

Suppose, again, that the cargo has been so damaged by water thrown in to extinguish a fire that it cannot be carried on to its destination, and, therefore, is sold at an intermediate port, it may sell there at a profit as compared with its value at its destination after deducting freight; indeed, this frequently happens with cargo of small value, such as coals, where the freight on a long voyage constitutes the chief part of its value. The merchant, therefore, makes a large profit. The shipowner, however, loses his freight: and this he is clearly entitled to in general average. Here, again, we have the same result. What is allowed for cargo sacrificed, added to what is received for cargo not sacrificed, amounts to a larger sum than would have been realized, for cargo and freight together, if there had been no sacrifice (*c*).

Again, there may be cases in which, for some special reason affecting either the cargo-owner alone or the shipowner alone, one or other of them is disentitled to recover his loss by jettison or sacrifice, while the other is entitled. In the case, for instance, of fire resulting from spontaneous combustion, supposing it could be proved that this was the result of [some negligence or wrong-doing on the part of the shipper in putting the cargo on board in a state of unfitness for shipment], so that the shipper could be pronounced in fault, he certainly

(c) See *Pirie v. Middle Dock Co.* (1881), 4 Asp. Mar. Law Ca. 388; *ante*, p. 88.

could make no claim for damage done in extinguishing it (*d*); but an innocent shipowner would nevertheless be entitled to compensation for any loss of freight he might sustain in consequence.

The loss of freight incidental to a sacrifice of cargo must be treated then as a substantial claim by itself, and be dealt with on its merits according to the terms of the charter; and it may be that the charterer, as well as the shipowner, has a distinct claim for his loss, as, for example, when the ship has been sublet at an advanced rate. This, however, will be more fitly discussed when we come to consider the mode of computing the amount allowable for sacrifices of cargo.

(*d*) See *Greenshields v. Stephens*, [1908] 1 K. B. 51 (C. A.); [1908] A. C. 431; *ante*, p. 81.

CHAPTER III.

SACRIFICES OF SHIP.

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*General Principles.*General
principles.

§ 21. There is no distinction in principle between a sacrifice of the cargo and a sacrifice of anything belonging to the ship: for there is nothing in the contract of affreightment which implies an obligation on the part of the shipowner or his servant to destroy, or expose to necessary destruction, any part of his ship. Accordingly all the old sea-laws, and the universal practice of all maritime countries, place the cutting away of a mast or the slipping of a cable on the same footing as the jettison of cargo. There is, however, this difference between ship and cargo: that the cargo ought never, under those

ordinary circumstances which alone are provided for by the contract of affreightment, to be exposed to risk; that is to say, to a risk beyond that which is common to the entire adventure; and, therefore, in case of exposure to any risk greater than ordinary, as by uncovering the hatches during a gale to throw cargo overboard, such exposure, if followed by loss or damage, is treated as a sacrifice. Certain parts of the ship and her tackle or machinery, on the other hand, are always, or may be under ordinary circumstances and still more in a gale, exposed to a risk greater than ordinary; as in the case of sails and tackling, which may be liable to greater risk of destruction in a gale than in fair weather, not merely from the stress of the wind, but on account of the greater necessity of carrying sail on the ship, *e.g.*, to avoid a lee-shore. Some degree of exposure to extraordinary risk, therefore, on the part of the ship's tackling and machinery, may naturally be regarded as no more than the ship's ordinary duty, and not amounting to a sacrifice for which compensation should be made.

The basis of arrangement in this chapter, conformably to the principles laid down at the commencement of Chapter II., but under greater difficulties from the circumstance that we are here less abundantly supplied with legal decisions, is, to take each branch of the subject separately, to begin with those which have been dealt with in our courts, and to marshal these in the order of antiquity amongst the decisions. When the authoritative decisions, of which the latest and far most valuable are those which lay down rules for what is technically called a "state of wreck," are thus exhausted, we are left to custom or the practice of adjusters, which is here set down, not as authoritative, but as a guide for those who have nothing better to follow. Thus we have as yet no better guide as to the important

question of voluntary stranding, a question here discussed somewhat fully, from a conviction that it must before long be brought before the courts.

Jettison of
ship's stores.

Price v. Noble.

§ 22. It has already been pointed out that a jettison of ship's stores—in the case tried, the guns, two anchors, two chains, and other stores from the middle deck—is treated as on the same footing with a jettison of cargo (*a*).

If properly
on deck.

The practice of adjusters here introduces a distinction analogous to that of deck and under-deck cargo. Many ships are lumbered with all kinds of useless articles on deck, which increase the risk, and are sure to be thrown overboard on the first approach of danger. To guard against the abuse of this practice, the rule in this country, as in Germany and most other states, is, that no jettison of ship's materials off the upper deck is treated as general average, unless it be of such articles as are necessary for the navigation of the ship, and therefore are carried on deck in conformity with the custom of the trade. Boats, studding-sails and their gear, spare spars, anchors, are examples of articles properly carried on deck: water-casks, provisions, spare sails, cables, ought not to be. Hawser in coasting trades or for short voyages may properly be on deck, though for a long voyage they should be got below as soon as they are dry.

Cutting away
a cable.

Birkley v.

Presgrave.

§ 23. The ship *Argo*, bound for Sunderland, was, whilst entering that port, caught by a sudden squall, which rendered it necessary to let go the anchor. She was fastened with a warp to the South Pier, in order to secure her from the storm; but the warp soon parted.

(*a*) *Price v. Noble* (1811), 4 Taunt. 123, *supra*, p. 57.

More cable was then paid away, and the ship was permitted to drive alongside the North Pier, to which she was made fast with hawser ends and towing lines, which were proper ropes, and such as were usually provided and employed for that purpose. Fearing that another ship would be adrift and come down upon *The Argo*, the master cut the cable, and therewith moored *The Argo* to the pier; and this he did for the preservation of the ship and cargo. Whilst they were so fastening her with the cable, the other ropes, through the violence of the storm and by another ship driving down upon *The Argo*, broke.

On these facts, the owner of the ship claimed as general average the value of the cable thus cut, and also that of the hawsers and towing lines. At the trial, the counsel for the plaintiff withdrew the demand in respect of the damage to the hawser-ends and towing lines, admitting that these were not claimable, as having only been applied to the ordinary purposes for which such things are provided; but claimed the cable, which had been "appropriated to a different use from what it was originally intended for, and which contributed to the preservation of the ship and cargo." This claim was admitted by the court. Lord Kenyon, C. J., said: "All ordinary loss and damage sustained by the ship, happening immediately from the storm or perils of the seas, must be borne by the shipowners; but all those articles which were made use of by the master and crew upon the particular emergency, and out of the ordinary course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably by the defendant as general average" (*b*).

No claim for things applied to their ordinary uses.

Only for things made use of on emergency, out of ordinary course.

§ 24. *The Nancy* had been captured by a French

Corington v. Roberts.

(*b*) *Birkley v. Presgrave* (1801), 1 East, 220.

Damage by
carrying
press of sail
to escape a
privateer.

privateer, but as it blew a gale and the sea ran high the Frenchman could not board her; whereupon the master of *The Nancy*, in order to make her escape, carried an unusual spread of canvas, in consequence of which she was much strained, opened most of her seams, and carried away the head of her mainmast; but finally succeeded in getting clear away. The owner of *The Nancy* sued his underwriter on ship for this damage, as particular average. The underwriter contended that he was only liable for his share, treating it as a general average, as a loss occasioned by an exertion to save the whole concern; and *Birkley v. Presgrave* (c) was cited in support of this view. But Sir J. Mansfield, C. J., said: "In the case referred to, there was an article given up for the benefit of the whole concern: a cable was sacrificed. The language of Lawrence, J., is, that all loss which arises in consequence of extraordinary sacrifices or expenses incurred for the preservation of the ship and cargo comes within the description of general average. This is only a common sea-risk. If the weather had been rather better, or the ship stronger, nothing might have happened" (d).

Modern
reasons for
this rule.

Damage by carrying a press of sail, whether as in this case, or to beat off a lee-shore during a gale, is in some countries treated as general average. At the conferences which preceded the framing of the York and Antwerp rules, this opinion was condemned by large majorities, and it was provided by Rule 6 that such damage is not to be so treated. This is also the rule of the German Code (e). The grounds of its rejection

German
Code: reasons
given at
conferences.

(c) 1 East, 220.

(d) *Corington v. Roberts* (1806), 2 Bos. & Pul. (N. R.) 378.

(e) Art. 707, No. 3. The same

principle was upheld in France by the Cour Royale de Rennes in 1822 (see Arnould, 8th edit., § 934), but it has more recently been held that

tion which, according to Ulrich, prevailed with the conference, were, that the shipowner was bound under his contract to furnish the cargo with all the ordinary means of reaching its destination which are supplied by the ship and her tackling, each part used in its appropriate way, whether it be with greater or less strain put upon it; and this includes, upon occasion, the carrying a press of sail(*f*). It has been likewise, for many years, the practice in this country to exclude such claims from general average; and this is ordinarily defended on grounds substantially the same as those above set forth. The sails are not intended for fair weather only, but to be set whenever required: if a press of sail is necessary, not merely to expedite the voyage, but to avoid some danger, this is merely performing an ordinary service at a time when not to do so would be peculiarly culpable.

Practice in England.

If indeed the ship is in a position in which the setting of sails at all must be regarded as something unusual, and which would be improper but for the emergency, the case may perhaps be otherwise. When a ship is aground, for example, and at tide time sails are set on her, in the hope of forcing her off the bank, by which means she is got afloat, but the sails are blown to pieces, this loss is in practice treated as a general average. On account of the greater resistance offered by a ship that is aground, this may be considered as an abusing of the sails, or applying them to a purpose for which they were not intended(*g*). But a case which

Sail set to force ship off ground.

Sail set to prevent ship running aground.

damage by carrying a press of sail, or by "forcement de vapeur" to escape shipwreck, is general average. (See *post*, App. I., p. 513.)

(*f*) Ulrich, *Grosse Haverei*, p. 41.

(*g*) Baily, *General Average*, p. 73. See *The Bona*, [1895] P. 125, *infra*, p. 142; see also No. 6 of the York-Antwerp Rules.

comes very near this is not in practice so treated: that is to say, when a ship is drifting ashore, and only saved by hoisting a sail, with the full knowledge that it must blow to pieces in a minute or two, but the momentary resistance it offers to the wind may, and does, bring her head round and save the ship. Not to allow the sail under such circumstances seems to be a hardship; but it is only the consistent application of the principle here laid down (*h*).

Damage by
fighting.
Taylor v.
Curtis.

§ 25. The ship *Hibernia*, on her voyage to St. Thomas, was attacked by a privateer. She resisted, and a severe engagement ensued. The privateer was beaten off, and *The Hibernia* delivered her cargo safe to the consignees. A claim as general average was made for damage sustained in her hull and rigging by the enemy's shot, for the cost of curing the seamen's wounds, and for gunpowder and shot expended. Gibbs, C. J., decided against the claim. "I cannot," he said, "distinguish this from the case of a ship carrying a press of sail to escape from her enemy. That is done voluntarily for the preservation of all; but it has been held that a loss arising from a hazard so incurred is not the subject of general average." The learned judge intimated, however, a strong opinion that some reward should be given for a gallant resistance, otherwise such resistances would not be made (*i*). This case was carried up to the full

(*h*) I have, however (said Mr. Lowndes), known cases in which sails so destroyed have been treated as general average; but I believe the practice, on the whole, is the other way; and this is certainly more consistent with *Covington v. Roberts*.

(*i*) *Taylor v. Curtis* (1815), 4 Camp. 337. In 1 Holt's N. P. at p. 193,

this judgment is given in somewhat different language. "I do not think this is general average. It was the duty of the sailors to defend the ship from capture in proportion to their means, and within measures of discretion. By so doing all parties have benefited. But in what respect have the captain and crew exceeded the

court, but the decision at *Nisi Prius* was confirmed. Gibbs, C. J., said :—" The measure of resisting the privateer was for the general benefit, but it was part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them, and there it seems to me they ought to rest" (*k*).

This decision has been much questioned. Damage, says Benecke, which is the consequence of a determination to resist, may be looked upon as damage voluntarily sustained; the defence is intended for the preservation of the whole (*l*). The argument that it was the duty of the crew to fight, says Phillips, proves too much: it is their duty to cut away a mast in case of need, or to make any sacrifice that may be requisite for the safety of ship and cargo (*m*). It is, however, not so easy to resist the argument from analogy with carrying a press of sail. If a ship sails on her voyage provided with guns and ammunition sufficient to resist an enemy, these are provided for that purpose and no other; and the use or expenditure of them, more or less, for their appropriate purpose, cannot be regarded as the subject of general average (*n*). The ship's being so equipped, again, is surely a notice to the crew that they are hired to fight in case of need, and not merely to navigate the ship.

Whether
right on
principle.

§ 26. Spare spars, planks, and other ship's materials used upon emergency for fuel for the ship's engines, to avert some danger, and when there has been no original

Materials
used for fuel.

line of their proper duty? What sacrifice have they made which they were not bound to make?"

(*k*) *S. C.* (1816), 6 Taunt. 608.

(*l*) Benecke, p. 231.

(*m*) Phillips, § 1310.

(*n*) The expenditure of ammunition under such circumstances is analogous to the use, during bad weather, of storm oil specially kept on board for that purpose. See below, p. 135.

insufficiency in the supply of coal, are the subject of general average (*o*).

State of Wreck.

State of
wreck.

§ 27. Another class of cases, which has given rise to much difference of opinion, consists in the cutting away of ship's materials when they are in what is called a state of wreck.

When a ship's mast has been carried away, and is held fast alongside, with the yards, sails, and rigging, and this wreck, beating against the ship's side, threatens to stave it in, and thus endangers ship and cargo, supposing that in such a case the master, instead of waiting to try how much he can save of this "wreck," for the common safety cuts it all away, is any part of this loss properly the subject of general average?

Practice
anterior to
decisions of
our courts.

Emerigon (*p*), and other foreign writers (*q*), hold that an allowance should in such cases be made, as general average, for so much as the articles thus sacrificed, in their actual condition, may reasonably be taken to be worth. And this is the rule in many foreign countries. In this country for many years the contrary practice has prevailed amongst adjusters. Stevens says

(*o*) *Ante*, § 14.

(*p*) Assurances, c. 12, § 41; p. 422 of Boulay-Paty's edit.

(*q*) Phillips (§ 1271), says:

"Mr. Benecke says: 'If the master's situation was such that, but for a voluntary destruction of a part of the vessel or her furniture, the whole would certainly and unavoidably have been lost, he could not claim restitution, because a thing cannot be said to have been sacrificed which had already ceased to have any value.' The correctness of this position admits

of great doubt; it is inconsistent with cases of undisputed claim for contribution, as, for instance, composition with pirates. It does not appear why the greatness and imminent threatening of the peril should be a reason against contribution for the value of the part that is sacrificed to avoid it. On the contrary, the more imminent the peril is, the less questionable seems to be the claim for contribution on account of a sacrifice made to avoid it."

the reason is, that the situation in which these articles are placed renders them of no value (*r*): to which Benecke objects, then if in any case it can be proved that they have some value when sacrificed, as for example if the ship was near a port, or if for any other reason there was a fair prospect of saving the sails and yards, were it only safe to wait till the sea should go down, in that case an allowance ought to be made (*s*).

On this question there have been in our courts the following dicta and decisions:—

In *Johnson v. Chapman*, a case already referred to (*t*), *Johnson v. Chapman.*
this question was touched upon by Willes, J., in the following words:—

“All the writers in this country and abroad appear to be agreed *Willes, J.*
that the question is, whether there is a common danger and a common sacrifice. They are not all agreed, it must be admitted, upon the application in practice of these rules. But there is one case upon which our average staters appear to be agreed, that is to say, if a mast were sprung and a part of it were to go overboard with a quantity of spars and sails attached to it hanging on by a stay which must give way in a minute or two, whilst in the meantime, by battering against the side of the vessel, it adds to the danger, and if the stay were cut to let it go at once, it would be very difficult to say that that was anything more than wreck. A lawyer could not lay it down as a matter of pure law that all lumber cut loose is wreck. But what I say is, if it was virtually lost, if not recoverable, if the act of cutting the rope was only hastening the moment at which it would be lost, you would properly call that wreck, and you would not say it was general average. The reason given is, because you cannot keep it. There is no intentional sacrifice in cutting it away. You must lose it, and the losing it a minute or two sooner can make all the difference of its doing great injury or not; but you cannot help losing it.

Not all lumber cut away is wreck; only that virtually lost.

(*r*) Stevens on Average, c. 1, § 1, art. 6.

(*s*) Benecke, *Ins.* p. 185. A theory set up by Bailly in his book on general average, touching the “cause

of danger” must, since the case of *Johnson v. Chapman*, be dismissed as untenable.

(*t*) *Ante*, § 11, p. 78.

“But if, instead of cutting away what is virtually lost only, you cut away a portion of what is still on board and safe, except for the common danger—for instance, a mast or bowsprit, for the purpose of facilitating the getting rid of the wreck which is only encumbering the vessel—if you do that, you ought to receive average in respect of the portion you so cut away, because that you do sacrifice. It may be it is exceedingly difficult in some cases—one can conceive it must be so—for average staters consistently to apply the principle. But the principle appears to be clear that if the danger is common and the thing is voluntarily sacrificed, it is contributed for rateably” (*u*).

Two cases have been tried in our courts, in both of which the attempt was made to exclude from general average the value of a mast cut away while still *in situ*, on the ground that by reason of previous damage to it or its supports the mast had been rendered of no value and virtually a wreck.

*Corry v.
Coulthard.*

The first of these, *Corry v. Coulthard*(*v*), is unfortunately not reported, but from the references to it in the subsequent case of *Shepherd v. Kottgen*(*x*) we may gather that the mast, an iron one, having become loose, the master, fearing that if it broke it would go through the bottom of the ship, cut it away. This was done in good faith and justifiably, though it appeared afterwards that the master's fear was unfounded. The question having been raised whether this was general average, the judge, Cleasby, B., directed the jury that the question turned on whether, “if the weather had moderated, the mast could possibly have been saved.” The jury found for the plaintiff, that is, in favour of general average. The case was carried up to the Court of Appeal, on the question of misdirection: but the court

(*u*) *Johnson v. Chapman* (1865), 19 1876, and in the Court of Appeal,
C. B. (N. S.) 563, at p. 582; 35 L. J. Jan. 17, 1877.
(C. P.) 23, at p. 28. (*x*) *Shepherd v. Kottgen* (1877), 2
(*v*) Heard in Exch. Div., Dec. 21, C. P. D. 578, at p. 583.

unanimously pronounced that the question had been rightly put to the jury. Cockburn, L. C. J., said: "It is not necessary that the judgment of the master should be borne out by the facts when they come to be examined into: it is enough if he exercise his judgment under all the circumstances. He must exercise his judgment." Brett, L. J., said: "You do not mean to say that it was so valueless that a man, in a calm, would have thrown it overboard: it was worth money Wreck means rubbish, I suppose" (y).

In *Shepherd v. Kottgen*, the barque *Rollo* met with a heavy gale, and portions of the rigging gave way, owing to which the mainmast began to lurch violently, so that the crew feared it would rip up the decks and endanger the ship's safety. To prevent this, the master, after vainly attempting to secure the mast, cut it away (z). At the trial, Manisty, J., put the question to the jury in the following form: "Are you of opinion that that mast

Shepherd v. Kottgen.

At Nisi Prius. Manisty, J.

(y) *Shepherd v. Kottgen* (1877), 2 C. P. D. 578, at p. 583.

(z) Four experts gave evidence as to the probable result of the state of things. The first stated that in his judgment it was impossible to repair the rigging so as to secure the mast, and that by cutting away the mast the captain accelerated its going overboard, "perhaps to the amount of a minute or two, not longer than that." The second stated that it was impossible to save the mast after the rigging was gone. The third stated that with the rigging gone the mast was "as good as a wreck"; that it was impossible to save it; that if the weather did not moderate it might be looked upon as likely to go over at any moment, and that there was no reasonable prospect of the weather moderating so as to enable

the crew to repair the rigging. The fourth stated that there was no chance of saving the mast. (At p. 585.)

"The substance of the evidence," said Grove, J., "appears to us to be: first, that if the storm had continued, of which there was great probability, the mast would not have broken, but would have gone wholly overboard, tearing up the ship, and that in all probability the whole would have been lost; secondly, that the mast might possibly have been saved if the weather had moderated quickly, but that this was very improbable; thirdly, that the mast was cut away, not as a mere incumbrance, like a mast overboard and attached to the ship by rigging, but for the purpose of preventing the tearing up the ship and sacrificing the adventure." (At p. 581.)

was virtually a wreck and valueless and gone at the time it went over?" The jury found that the mast was a wreck; and, to a further question from the learned judge, "Do you find whether it was hopelessly lost?" they answered "Yes." On this the judgment was given against general average.

In Divisional
Court.

The question going up to the Divisional Court, the judges (Grove and Lopes, JJ.) reversed the decision; on the ground, first, that the question ought to have been put to the jury in the same form as in *Corry v. Coulthard* (a), and secondly, that the verdict was against the weight of the evidence.

Grove, J.

"In our judgment," said Grove, J., "the beneficial objects of the doctrine and law of general average would be frittered away if, where a sacrifice is made, as seems obviously the case here, to save the whole adventure, the sharing the burden of such sacrifice could be made to depend upon nice questions of probability afterwards discussed, as to whether the thing might or might not have been saved. In ordinary questions of general average, it is presupposed that great danger exists to the ship and cargo, and in those cases the probability is that the thing sacrificed would have gone with the whole venture, and therefore it would be the sacrifice of a probably valueless thing. Here, if the mast had gone, the ship would probably have gone with it. The ship was probably saved by the sacrifice of the mast. The evidence appears all one way on this point. The case differs in our judgment from those of cutting away wreck, as hypothetically put by Willes, J., in the case of *Johnson v. Chapman* (b), where he supposes a case of part of a mast going overboard, with spars and sails attached to it, and hanging by a stay, battering and adding to the danger of a vessel. There the wreck is real, not anticipatory; and as Willes, J., observes, 'You cannot keep it; there is no intentional sacrifice in cutting it away.' Here, the mast was sound and entire as a mast; it was in its usual place, though lurching from the rigging being gone from one side.

(a) *Ante*, p. 120.

(b) (1865), 19 C. B. (N. S.) 563, at

p. 582; 35 L. J. (C. P.) 23, at p. 28;

ante, p. 119.

"It would defeat the main utility of general average, if, at a moment of emergency, the captain's mind were to hesitate as to saving the adventure, through fear of casting a burden on his owners. What was the pressing necessity here at the time of the act? The prevention of the ship's being torn up and lost. 'Wreck' is hardly an accurate term for contingent wreck. The making the potential the same as the actual, we cannot help thinking, will much embarrass the law on the subject; and the judgment of experts as to probabilities after the event is a very dangerous criterion for a jury to be guided by. The case of *Corry v. Coulthard* is almost identical in facts with this case; indeed, in our judgment, it is identical in so far as the legal question is concerned. . . .

Danger of over-nice distinctions.

Wreck not contingent wreck.

"In the present case it appears to us the evidence is greatly preponderating, that the mast was cut away for the benefit of the ship, cargo, and crew, that it was not actual wreck, and was not cut away as such. . . . Being of opinion that the question of the mast being saved was put to the jury as one of probability, and not of possibility; that no question was left to them as to the purpose for which the mast was cut away; and that contingent wreck was treated by the judge as though it were actual wreck,—we think there should be a new trial. We also think that, although the learned judge is not dissatisfied with the verdict, yet the verdict was against the weight of evidence, regarding the evidence from the point of view we have regarded it in in this judgment" (c).

This case was carried to the Court of Appeal, where the judgment of the Divisional Court was reversed, and that of Manisty, J., reinstated. In doing this, the Court of Appeal adopted and concurred with the law as laid down in the Divisional Court, differing from it only in thinking that the law as laid down to the jury by Manisty, J., amounted to the same thing.

In Court of Appeal.

Bramwell, L. J., said:

"I think that this appeal must be allowed. The right question was left to the jury, and the verdict was supported by sufficient evidence; and when the judgment of the Common Pleas Division is examined, it will be found that there is no real difference as to

Bramwell, L.J.

the law between Grove, J., and Lopes, J., upon the one hand, and Manisty, J., upon the other; but that they misapprehended the effect of what he stated to the jury. They seem to have thought that he omitted to ask the jury whether it was possible to save the mast. I think he did ask that question, and that it was answered in the negative, for the jury said that the mast was 'hopelessly lost.' Upon the evidence it is plain that the mast was in the course of destruction, and the only matter to be considered by those on board was, in what manner its destruction should be completed. Lord Justice Brett has communicated to me the propositions which he intends to lay down in the course of his judgment, and I think that they will be of value for guidance in future cases of this sort. I wish, however, to put my own view shortly, in these terms: Where the thing destroyed has some peculiar condition attached to it, so that it will be lost whether the whole adventure is saved or not, then its destruction cannot be deemed a sacrifice. I think that this proposition applies to the present facts. The mast was in such a state that it must have been lost, whether the vessel got safely to port or not. Consequently there was no sacrifice of it when it was cut away, and the plaintiffs have no claim for contribution. In truth, the cause of the mast being lost was the giving way of the rigging, which in all probability had been imperfectly fitted. I very much agree with the view of the law taken by the judges of the Common Pleas Division; but differing from them as to their view of the direction to the jury, I think that the right question was put by Manisty, J., with very great precision" (*d*).

Agrees with
law as laid
down in Divi-
sional Court.

Brett, L. J., said :

Brett, L. J.

"In my opinion the judge at the trial left the right question to the jury, and there was evidence upon which the jury might find for the defendants, and upon that finding no claim for general average can be maintained. Strange to say, the question before us is novel in the English courts. The definition of general average has often been discussed, and the incidents necessary to found a claim for contribution have often been enumerated; and it has been established that general average cannot exist without an intentional sacrifice, but the meaning of the word 'sacrifice,' and what is comprehended by it, have never before been thoroughly considered.

The question before us arose, to a certain extent, in *Corry v. Coulthard* (e), but owing to the finding of the jury in that case, it was not there necessary to define the meaning of the word 'sacrifice' so nicely as it must be defined upon the present occasion.

"Unless 'possibility' means either a mathematical or scientific possibility, I entirely agree with Lord Justice Bramwell that the question left to the jury by Manisty, J., was really and substantially the question which the judges of the Common Pleas Division considered ought to have been asked of the jury; but in the ordinary occurrences of life 'possibility' is never used in that sense, and is not so used in any part of maritime law. In the present case, the act relied on by the plaintiffs as the act of sacrifice is the cutting of the port rigging in order to ensure the immediate falling of the mast; and we have to determine whether the contention for the plaintiffs is correct.

"I shall assume, for the purposes of my judgment, that the captain, when he ordered the port rigging to be cut away, did intend to sacrifice the mast for the benefit of both ship and cargo; and I shall not assume that he believed at that moment the mast to be absolutely lost, and that he cut it away only with the object of getting rid of it. Now, consistently with the decision of this court in *Corry v. Coulthard* (f), and in accordance, as it seems to me, with what was intimated by the court in that case, the following proposition may be stated: If anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average. Or the proposition may be stated in the following terms: Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice (g). Another form of stating the result of this proposition is

Tests of
wreck.

(e) See *ante*, p. 120.

(f) *Ante*, p. 120.

(g) Cf. judgment of Bigham, J., in the case of *Iredale v. China Traders' Insce. Co.*, [1899] 2 Q. B. 356.

to say that there is nothing in respect of which a general average contribution could be claimed, because the thing in respect of which the contribution is claimed was, when the act relied upon was done, of no value whatever to the owner. Does this proposition apply here? It seems to me that the finding of the jury upon the question left to them must mean that at the time when the act relied upon was done, namely, when the port rigging was cut away in order to cause the mast to fall overboard, the mast could not be saved, not indeed by reason of any inherent defect, but owing to the violence of the gale, the giving way of the rigging, and the impossibility of the weather moderating so as to allow it to be repaired; the mast was necessarily lost, and must have been lost to its owners, whether the vessel should or should not be saved; or, in other words, that though the ship should outlive the storm, and though the mast should not be cut away, it would fall overboard and be lost in the space of a few minutes; there was no possibility, of which human foresight could take account, of the storm abating, so as to enable the mast to be secured, and the mast was lost whether it was or was not cut away. Under these circumstances it seems to me that there was no sacrifice of the mast, that the act relied upon caused no loss to the owners, and therefore that no claim for general average can be sustained.

"I may add that what distinguishes this case from *Corry v. Coulthard* (h) is that there the jury found that it was possible to save the mast; it follows that in *Corry v. Coulthard* the mast was of some value, and the facts of that case did not fall within the proposition which I have endeavoured to lay down" (i).

Cotton, L. J., said:

Cotton, L. J.

"'Hopelessly lost' must mean 'impossible to be saved.' In the language of everyday life a thing is impossible when, according to the ordinary course of human events, no expectation can be entertained that it will happen. . . . Where the thing said to have been voluntarily abandoned or destroyed is in such a state, by reason of a peril peculiar to itself, that if the act of supposed sacrifice had not been done, it would have very shortly been destroyed, without the rest of the common adventure being lost, the act of slightly

(h) *Ante*, p. 120.

(i) *Shepherd v. Kettgen* (1877), 2 C. P. D. 585, at p. 589.

hastening the moment of loss, is not an act of sacrifice which enables the owner of the thing to claim contribution" (k).

[In *Montgomery v. Indemnity Mutual Marine Ins. Co.* (l), the facts were that *The Airlie* encountered bad weather, in which she rolled and lurched violently. The main-mast, which was made of iron, and hollow, settled down, and the master, fearing that it would break and fall on the deck and cause the loss of the vessel, cut away the windward rigging, after which the mast fell on the side and was cut adrift. It was afterwards found that the mast had been in no greater peril than the rest of the adventure. It had broken across about twelve inches from the keelson. The upper portion had crushed into the lower in telescope fashion and rested securely on the keelson. Mathew, J., said in his judgment:—

"The mast was not in such a condition that it must have been lost whether the rest of the adventure had been saved or not. It could not be said that the mast had no value, or that it was impossible to be saved. There was a chance of saving it, and that chance was thrown away for the safety of the whole adventure. The master would seem to have exercised his judgment reasonably, and it was not necessary that his view should be borne out by the facts when they came to be afterwards examined. For the defendants reliance was placed on the case of *Shepherd v. Kottgen* (m), where the mast was cut away, but was held to have been already lost. There it appeared that the rigging had been loosened in the storm, and that all that was done was to anticipate by a few minutes an inevitable loss. The mast of *The Airlie* before the rigging was cut was firmly upheld, and could have stood and been saved if the master had not ordered it to be cut away. Upon the question of fact I am of opinion that there was a general average sacrifice" (n).]

(k) At p. 591.

(l) [1901] 1 Q. B. 147.

(m) (1877), 2 C. P. D. 578.

(n) Cf. *May v. Keystone Yellow Pine Co.* (1902), 117 Fed. R. 287, where the rudder of a ship, partly

torn loose in a gale, was cut away to prevent it from beating a hole in the ship. But for the storm it could have been replaced in position: and its value in its damaged condition was allowed in general average.

Conclusion.

These decisions are set forth here very fully on account of their great importance. English adjusters have in them for the first time an authoritative principle for their guidance on the subject of wreck cut away. What remains is, first, to condense this principle into a formula, and secondly, to apply it to particular cases in the form of a set of working rules. This is especially the business of our Adjusters' Association.

Formula.

Our formula may be expressed thus: whatever, when cut away or parted from for the common safety, is already "in a state of wreck," is not admissible as general average. That is in a state of wreck which is in such a state that, even if it had not been thus cut away or parted from, and though the ship and cargo had nevertheless escaped the danger, that thing would certainly have perished or become of no value. It is not enough that it would perhaps or very likely have perished: on the other hand, it is not necessary that its perishing should be demonstrably certain; but if, according to the ordinary course of human events, no expectation could be entertained that it could be saved (a matter on which the judgment of experts may be called in), then it must be treated as in a state of wreck or of no value.

Proposed
rules of
practice.

Any general rules that may be framed, applicable to classes of cases, must be regarded as subject to this principle, and therefore as of *prima facie* authority only; their use, in fact, being to deal with those numerous cases in which there is no attainable evidence, one way or the other, as to these questions of reasonable possibility. I suggest the following:—

1. When a mast has fallen overboard, and the broken mast with yards and sails is cut from alongside,

this is to be treated as wreck and of no value unless the contrary is proved.

To prove the contrary, it must be shown, by the evidence of experts, or other positive evidence, that there was, in the particular case, owing to some exceptional circumstances, a reasonable possibility of recovering some portion of the wreck, and of its being when recovered of some value.

To give an example: I have known cases where the squall which carried away the mast was seen travelling across a sea that was calm, and after a few minutes leaving the sea calm again: so that, if it only had been safe to postpone the cutting away of the wreck for, suppose, five minutes, it would have been lying alongside in smooth water, and the sails and some of the spars and ropes could have been recovered with ease, and perhaps very little injured. In such a case there certainly ought to be some allowance for the loss by cutting away.

2. When a mast is still standing, or *in situ*, though sprung or cracked or loose from breaking of the rigging or other cause, and is cut away for the general safety, the presumption is the other way: it is to be taken that the mast may possibly be secured, unless the contrary be proved (*o*). The contrary is proved, if on the evidence of experts or other positive evidence it is proved that there was, at the time of cutting away, no reasonable possibility (as defined above) of saving the mast.

This rule may seem, perhaps, more questionable than the former: for, it may be said, we have for our guidance two such cases determined by juries, and these were

(*o*) Of course, if the mast is cracked or otherwise injured, so that, though the mast might have been saved, it must necessarily have cost something to repair the accidental damage, a

deduction to this extent must be made from the allowance in general average. See *Kelvin's case*, below, p. 130.

determined in opposite ways. But the decision of the jury in *Shepherd v. Kottgen* was pronounced by the Divisional Court to be against the weight of evidence, and the Court of Appeal went no further than to say there was evidence upon which the jury *might* find for the defendants (*p*).

To illustrate this, I may give one or two cases which have occurred in practice.

Kelvin's case.

The ship *Kelvin*, outward bound from Liverpool, sprung her main and mizen (lower) masts in a gale, and being thus disabled bore up for Liverpool to repair, and, a violent gale coming on, was brought to anchor off the North-West Lightship. Shortly she began to drive, and, being in danger of drifting on the sandbanks, the pilot ordered the main and mizen masts to be cut away for the general safety. In this case the adjuster admitted into general average the value of the topmasts and all above, and of the yards, sails, and rigging of the lower masts; but he did not allow the lower masts themselves, being of opinion that these would have had to be replaced in any case: and the claim thus adjusted was settled without dispute.

A ship's main-mast had been carried away, and remained attached to the mizen-mast by the stays, braces, and other ropes. The wreck hung heavily on the mizen-mast, and caused it to sway about to such an extent that the crew feared it would fall on deck so as to be dangerous. They could not get at the ropes which held the main-mast to the mizen-mast, for the wreck was too far to leeward, and the mizen-mast was lurching too violently for the men to go aloft. They therefore cut away the mizen-mast so that it should fall aft and clear of the ship. This loss of the mizen-mast was treated by

the adjuster, in 1857, as particular average, on the ground that by the loss of the main-mast the mizen-mast was placed in a state of wreck. This conclusion, with our present lights, must be regarded as at least very questionable.

Miscellaneous Cases.

§ 28. The following few cases are of no authority, but are here set down simply to illustrate the practice in cases of some curiosity or doubt.

Miscellaneous cases.

A schooner, drifting in a strong tideway, was carried under the hawse of a ship at anchor, and the ship's bowsprit catching the stay between the two masts of the schooner, the latter was pressed over so as to be in danger of capsizing, to prevent which the schooner's masts were cut away. This was treated as general average.

Cutting away to clear collision.

Two vessels, both at anchor, were in collision, and in attempting to get clear the anchor of one of them was hove up, but found to have hooked the chain of the other; whereupon, to get clear and avoid a second collision, the anchor was slipped. This was treated as a general average.

Speaking generally, when two vessels are in collision, and it becomes necessary for the safety of one of them to clear her by cutting away parts of the rigging which are entangled with that of the other ship, the rigging so cut away is not treated, in practice, as in a state of wreck and worthless; but an allowance is made, in general average, for its value at the time when it was cut away.

Where a ship's anchor and chain were washed off the bows by a sea, and hanging over the bow threatened to stave it in, and were therefore cut away, is this loss general average? Some years ago an adjuster rejected

Anchor washed by sea off bows.

the claim, treating it as in a state of wreck. This I now think is wrong, since there can be no doubt that, were it not for the immediate danger, the anchor might sooner or later have been hove in by the windlass.

Sacrifice
merged in
subsequent
loss.

Where a ship's bottom is so damaged by spars cut away that she must be re-metalled, and during the same voyage, no matter whether before or after the cutting away of the spars, her bottom is so damaged by stress of weather that in order to recaulk it she must be re-metalled, the cost of re-metalling is treated as particular, not general, average. This is consistent with the principles laid down above: for the cutting away of the masts has in result occasioned no loss, in respect of metalling, to the shipowner; since, whether they had been cut away or not, the bottom must have been re-metalled. The value of the metal actually rubbed away by the spars, at the price of old metal, is all that can be allowed; for this is actually lost (*q*).

Boat or spars
washed adrift.

If a boat has been washed to leeward in a gale, and is thereby rendered dangerous to the ship, as for instance by keeping her from righting if she is on her beam ends, and is on that account broken up by the crew or thrown overboard, the practice formerly was to disallow the boat, as in a state of wreck and valueless. This is clearly wrong: a boat, or spare spars or other articles properly on deck, which are adrift, and dangerous, but

(*q*) It has been doubted, however, whether this is consistent with the judgment of Brett, M. R., in *The China and Transpacific Co. v. Marine Ins. Co.* (1885) (11 App. Cas. at p. 579), from which it might be inferred that in these mixed cases one half of the damage should be set down as general average. "I may say that I do not myself share this opinion," was Mr.

Lowndes' conclusion. The editors also fail to appreciate the application of the case cited to the question under discussion. The judgment in that case deals with the division of dock charges incurred while two separate operations are being performed; the question under discussion is, whether the cost of one operation ought to be divided.

which if it were safe to wait till the gale should go down could certainly be secured again, are on precisely the same footing as the deals in *Johnson v. Chapman* (r).

Anchors slipped because they become “foul”—that is, held fast by some obstruction under water, as, by having caught under a rock or some other anchors or chains,—are allowable as general average only when it may reasonably be inferred that the obstruction was of a temporary nature, so that the anchor might have been cleared if it had not been dangerous to wait. If, then, after all practicable exertions have been made to raise the anchor, the captain slips the chain in despair of ever recovering it, this is not general average. But if, before there has been time to make those exertions, and while it is still uncertain whether the anchor is permanently fixed or not, some sudden danger, such as a shift of wind throwing him on a lee shore, or the risk of a collision, renders it necessary to slip the chain, the presumption is in practice taken to be, that the chain might possibly have been recovered if time could have been given, and therefore it is treated as general average. This, however, is a presumption merely, and no doubt might be defeated upon the evidence of experts, if it could be obtained, that under the particular circumstances the recovery of the anchor was virtually or as a matter of common sense impossible.

The same principles are applicable to the case of chains slipped because twisted with one another, or because the anchor has run out so far, in deep water, that it cannot be got in.

When a chain has by accident been broken near the anchor, so that there remains a long piece of it hanging outside the ship, and if, before this can be got in by the

windlass, it becomes necessary to slip it because it has become a source of danger to the ship, by impeding its movements on a lee shore or to avoid a collision, the practice formerly was not, but now is, to allow the loss of this remainder as general average. The present practice is evidently correct, according to the principle laid down by the decisions.

Jury-rig and analogous cases.

§ 29. We come now to a class of cases as to which we have no express legal decisions, but custom or practice only. That this is of no binding authority, in matters of principle, has already been pointed out (s). There is, however, on the part of our judges a natural tendency—difficult indeed to be reckoned on, since it is as naturally stronger in some judges than others—to pay a sort of *primâ facie* respect to such customs, as presumably falling in with the wishes and perhaps requirements of mercantile men.

Jury masts
and rudders.

A very ancient, general, and undisputed custom of this kind is that which relates to jury-rig. When a ship's mast or rudder is carried away, and a "jury" or temporary mast or rudder is fitted up at sea as a substitute, the value of the materials cut up or destroyed for the purpose, such as spare spars, ropes, chain, or the like, together with any damage done to the hull of the ship by cutting or adapting it to the purpose, or by the action of the jury-materials—*e.g.*, the corrosion of the copper by chains carried from forward or amidships to work a jury-rudder—are in practice treated as general average.

This practice is supported by the decision in *Birkley v. Presgrave* (t), so far as the articles thus used are ap-

(s) Chap. II. § 9.

The Bona, [1895] P. 932, *infra*,

(t) *Ante*, § 24, p. 112. See also § 34.

plied to different uses from what they were originally intended for. "The distinction," says Carver, "is to be drawn between the use of things for their ordinary purposes, and the use of them in ways for which they were not intended" (*u*). This would apply to running-rigging or towing lines cut up for securing a jury-rudder; but hardly, perhaps, to the spare spars, since these are put on board for such purposes only: but in practice no distinction is drawn between them. The entire cost of the jury-rig is treated as general average: not only the spars and ropes cut up and deliberately spoilt for the purpose, but also the jury-sails which are subsequently blown away, by reason of their not being adapted to the service to which they are thus provisionally turned, or of their having from any reason been exposed to an unusual risk, as, for example, from bending a topgallant-sail to do the work of a topsail.

Sails spoilt in such work.

Rockets or blue lights burnt as signals of distress, [or oil carried specially for use as storm-oil, and so used in bad weather], or fenders put out to prevent collision, and smashed, or damage to the pumps caused by the stress of pumping a leaky ship, are not treated as general average; for that is the very purpose for which such things are carried in the ship.

Rockets, fenders, and pumps extra.

Spars or ropes cut up at sea to "fish" or secure a mast that is sprung, or to secure boats or spare spars when adrift, or to make a "drag" to get the ship's

Fishing sprung mast.

(*u*) Carver, *Carriage by Sea*, § 384. "A general practice," says Lord Blackburn, "long continued amongst English adjusters, affords strong ground for thinking that the practice is one which is not in general inconvenient, and it throws a considerable onus on those who impugn it to show that the particular circumstances are

such as to render an adherence to the practice in that case against principle." (*Scendsen v. Wallace*, 10 App. Cas. 404, at p. 416.) See also the judgments in *Balmoral S.S. Co. v. Marten*, [1902] A. C. 511, as to the desirability of upholding a long-established practice of average adjusters.

head round when in a position of danger, or to construct pumping machines, or for any such out-of-the-way purpose which may have the effect of rescuing the ship from danger, are treated as general average.

Anchor suddenly let go.

When an anchor is let go without the usual preparations, in order to avoid some sudden danger, such as a collision or the running aground, and in consequence the chain snaps, this is in practice treated as general average.

Hawser used for chain.

When a ship's anchors have been carried away, and to prevent her running aground it is necessary to moor her in a tide-way by a hawser and a kedge, and these, being insufficient for such work, part as soon as they are let go, this loss has been treated as general average. This is a case of applying the ship's materials to purposes for which they are not intended, and so exposing them to an extraordinary danger.

Damage by docking in a gale.

When a ship, having lost her anchors, or being very leaky, so that it is dangerous to remain in the river or roadstead, is run into a dock while a gale is blowing, and when it would under ordinary circumstances have been improper to do so, and is damaged by striking against the pier in entering it, it seems to be a doubtful point whether this damage should be treated as general average. It is, perhaps, analogous to a voluntary stranding, and therefore properly general average; being the voluntary substitution of a risk affecting the ship for one affecting the whole. It cannot be said, however, that there is a settled practice on the point.

Damage to ship by discharging cargo.

If a ship is necessarily damaged in the act of discharging cargo at a port of refuge, as, for instance, if the rails or hatches are broken for want of proper appliances at the place, or from the necessity of unusual haste, it seems clear that, provided the cost of discharging

belongs to general average, this damage should be treated in the same way.

§ 30. When a ship, having sustained particular average damage, puts into a port of refuge where she cannot be repaired except in a temporary manner, such repairing is not to be considered as general average. This is virtually decided by the case of *Wilson v. Bank of Victoria* (x). There are, however, some cases in which what is done at the port of refuge is not properly to be called repairing, but rather the supplying of a contrivance which may take the place of a tug, or obviate the necessity of discharging cargo: and so may properly be treated as a general average, or a substituted expense. It is often difficult to draw the line. In one case, where a ship had lost a rudder, and in order to avoid the unreasonable expense of discharging the cargo and sending out a new rudder from England or perhaps replacing it on the spot at an enormous cost, a contrivance of chains fitted to work in a temporary frame round the sternpost was devised, by means of which the ship was brought safely home at a small expense, this was treated by the adjuster as a "substituted charge" (y), and was so settled by all parties without dispute. The same course was adopted in another case where, under similar circumstances, a leak in the bottom was stopped by means of "mushrooms," or iron plugs fitted in from the outside.

Temporary
repairs at port
of refuge.

The principle which underlies most if not all these matters of ordinary practice may be expressed as follows: While it is the duty of the master under his contract to apply each part of his ship and tackling to its

Principle.

(x) (1867), L. R. 2 Q. B. 203; p. 268.
36 L. J. (Q. B.) 89. See *post*, § 55, (y) See *post*, § 55, p. 268.

proper uses in carrying on his voyage, without regard to the more or less of exposure to danger which the doing so may involve (*z*), he is not bound to destroy any of them, nor to abuse any—understanding by this term “abuse” the using it for purposes for which it was not intended nor constructed, and which, therefore, expose it to an extraordinary risk (*a*). If he does so, he does it as general average, *i.e.*, under an implied contract with all those whose property he shall bring into safety by so doing, that any loss he thereby incurs shall be made good by the contribution of all.

Damage done
in getting
ship clear,
viz. :—

§ 31. On the same principle, damage done to a ship by the means taken to get her off a shore, or clear of a collision, or otherwise out of a situation of imminent danger, may frequently give rise to a claim for general average; of which the following cases, taken from the ordinary practice of adjusters, are examples.

Damage to
boats
launched.

If, after a ship has run aground, one of her boats is launched in a gale of wind to carry out a hawser in order to heave her off, or otherwise to assist in floating her, and the boat is swamped or injured in the attempt, this damage is treated as general average: not so, if the boat were got out merely to save the lives of the passengers or crew (*b*).

Damage to
ship by
heaving off.

Damage done to the ship in the act of heaving her afloat (whether by an anchor or a tug) with her cargo on board, such as hawsers broken, a windlass or winch strained, stanchions started, or other damage directly caused to the ship's upperworks or bottom by the strain used, is general average. It may sometimes be a little

(*z*) See *Covington v. Roberts*, *ante*, § 25.

(*b*) See, however, the dictum as to sacrifices made in fear of death, *ante*,

(*a*) See *Birkley v. Presgrave*, *ante*, § 2, p. 25.
§ 24; *The Bona*, *infra*, § 34.

difficult to distinguish between damage caused by having been on the ground, and by pulling off, *e.g.* if her false keel is twisted off by the resistance which her position on the ground offers to the strain at her bows. Baily (*c*) suggests the rough and ready rule, that all damage above the water line shall be admitted as general average, and all below excluded. This, however, he does not attempt to defend as a matter of principle. The question is not whether the damage is caused by heaving or caused by the resistance; by the strain at the bow or the counter-strain along the keel: that is immaterial. The question is really that raised in *Shepherd v. Kottgen* (*d*), viz., was the damage already virtually suffered by the ship, so that it would have been there, although the ship had not been hove off and yet had floated? We are to inquire, supposing, for example, that the ship had floated off by herself after being lightened, or by a rise of tide, whether the false keel could by reasonable possibility have escaped being twisted off or otherwise destroyed; and, if so, the loss of it must be treated as a consequence of the measure, adopted for the common safety, of at once heaving her off, and therefore as general average.

Sacrifice merged in a subsequent Loss.

§ 32. I may mention in this place, as fitly, perhaps, as at any other, a point of principle which has to be attended to wherever we are called on to discriminate between general average and accidental or particular average damage to a ship, in the sense that this or that individual piece of repair might have been necessitated by either cause apart from the other. Just as, in the case of a jettison followed by a loss, it is not the value

Sacrifice
merged in
subsequent
loss.

(*c*) Baily, Gen. Av. pp. 42, 77.

(*d*) See *ante*, p. 121.

which at the time was sacrificed, it is that which, in the ultimate result, was lost to the owner, which is to be made good; so when damage is purposely done to the ship for the common safety, and, on the same voyage, whether before or after that act, the thing thus damaged has been damaged by some independent accident, and therefore the loss resulting from the act of sacrifice is less than was intended, or than it otherwise would have been, there must be a proportionably smaller compensation. For example, if by reason of corrosion of the metal through carrying chains along it to work a jury-rudder it is found necessary, on arrival, to re-metal the ship, but it was likewise necessary to re-metal her, to caulk the bottom strained through bad weather, no part of the cost of re-metalling is to be attributed to general average; for, if the chains had never been used, re-metalling would still have been required (*e*). This likewise follows from the principle laid down in *Shepherd v. Kottgen* (*f*). So if a topmast is cut away, and subsequently its lower mast is carried away by an independent accident, there should be no contribution, for the topmast would have been lost in any event. So in the case at present before us; supposing the false keel had clearly been carried away by the strain of heaving the ship off, yet if the main keel had been split by lying on the ground and bumping there, and if in order to repair the main keel it would have been necessary to tear off and destroy the false keel, so that its carrying away by heaving the ship off has occasioned no actual loss to the owner, there can be no claim on this account

(*e*) Strictly speaking, however, allowance should be made in general average of an amount representing the reduction in the value of the old metal, credited against the cost of

re-metalling, due to the action of the chains used for the purpose of working the jury-rudder.

(*f*) *Ante*, p. 121.

as general average. With these principles for our guide, there ought to be no insuperable difficulty in distinguishing between damage to a ship's bottom by stranding, and by heaving off the strand.

§ 33. If a steamer, coming alongside a ship to render a salvage service during a gale, staves in the ship's bulwark, or does such other damage to her upper works as may fairly be regarded as the natural consequence of approaching the vessel at such a time, the damage is, in practice, treated as general average. But if, through unskilful handling, or by some sudden accident, the steamer comes into collision with the ship, and sinks or seriously injures her, the case is not so treated. The reason for this distinction is that, in inviting a steamer to come alongside, the master must know that some damage to his upper works is extremely probable; but he has a right to expect skilful navigation on the part of the steamer, and he does not guarantee against unforeseen accidents.

Damage by
tug coming
alongside to
render sal-
vage service.

§ 34. When a steamer is aground, and the engines are set or kept going in order either to back her off the ground, or to drive her higher and to a safer place on the bank or over it, the question whether any damage suffered by the machinery from being so worked is admissible as general average was not settled when Mr. Lowndes wrote. On the principles above laid down, a distinction ought [he said] to be made between the cases in which the working of the engines in this manner does and does not expose them to some extraordinary danger. In very many cases, while the steamer itself is aground, the screw is well above water, so that the risk of damage to the screw itself by

Damage by
using engines
to force
steamer off
ground.

revolving is no greater than at ordinary times. In such a case, the using of it cannot be regarded as any more than, if so much as, the carrying a press of sail, as in *Covington v. Roberts*; it is plainly the ordinary duty of using the ship's materials at their proper work, though under extraordinary circumstances. But there are other cases in which the screw could only be worked among rocks, or in sand or mud, in a manner which might properly be called *abusing* it, as exposing it to danger of breakage, or of sucking in sand or mud among the tubes of the machinery, in a manner unusual, and which would be highly improper but for the common danger. Damage done in this manner seems to be analogous to the loss of sails blown away when set in order to force a ship off the ground.

[Mr. Lowndes' view has been confirmed by the decision of the Court of Appeal in *The Bona (g)*. In that case the vessel was stranded in a position of great danger, and she was got off by working the engines full speed ahead and astern, whereby they were subjected to an unusual strain and considerably damaged.

The Court of Appeal held that this damage was recoverable in general average, as the machinery was intentionally used, for the preservation of the ship and cargo, in an abnormal manner which exposed it to the risk of serious injury. It was further held that the expenditure of coal for this extraordinary purpose was also to be allowed in general average.]

(g) [1895] P. 125; cf. *Trafalgar S.S. Co. v. British and Foreign Mar. Ins. Co.*, *post*, p. 178, n. In *Walford de Baerdemaeker v. Galindez* (1897), 2 Com. Cas. 127, damage done to the boilers of a steamship through

using cannel coal, which was part of the cargo, in an emergency, when the supply of bunker coal had been exhausted, was allowed in general average.

§ 35. I may conclude this section by adding one case in which a sacrifice purposely made is not in practice treated as general average, because the danger is too remote ; viz., when sails are cut away to save a mast or spar. It is argued sometimes that if the spar were to go, the ship and cargo might be in danger ; and if this could be proved, so that it could properly be said that the common safety was in reality the motive for cutting away the sail, I do not see how the claim could be resisted. If, however, as often is the case, the danger to the whole were problematical, while it is in the meantime certain that, if the sail be not cut away, the mast must fall, so that the so-called sacrifice must certainly benefit the shipowner by saving his mast, while any ulterior benefit to the cargo is uncertain, it seems hardly reasonable on his part to ask for compensation.

Sail cut away
to save a spar.

Voluntary Stranding.

§ 36. When a ship is voluntarily run upon a sand- Principle.
bank, or scuttled, or purposely sunk in shallow water, in order to escape the pursuit of an enemy or the imminent danger of being dashed to pieces on rocks, or sinking in deep water, or to extinguish a fire on board, and if the ship or the cargo suffers damage by reason of that measure, is such damage properly the subject of general average ?

The answer which would first occur to perhaps every one to whom this should come as a perfectly new question would probably be, without hesitation, in the affirmative. Such damage is the result of a measure, out of the ordinary course, taken for the common safety and to avert an imminent peril, and involving a sacrifice, viz., the danger of almost certain injury to the bottom of the

ship, and considerable risk to the cargo in the lower hold, from leakage caused by the shock below. It is the substitution of a danger affecting mainly, if not exclusively, the lower portion of the ship and cargo for a danger of total loss, that is, a danger affecting all parts equally. In this sense it is the sacrifice of a part for the benefit of the remainder. Accordingly, the rule in almost every other country—I might perhaps say of every one—is to treat such damage, at all events when the ship is got off again, as general average.

Practice or
custom of
Lloyd's.

For many years, however, there has been a practice amongst English adjusters, called a custom of Lloyd's, which was adopted by the Adjusters' Association in the year 1876 as follows: "The custom of Lloyd's excludes from general average all damage to ship or cargo resulting from a voluntary stranding. This rule does not necessarily exclude such damage as is done by beaching or scuttling a burning ship to extinguish the fire."

History of
this practice.

The history and origin of this practice may be traced in Stevens on Average. Mr. Stevens, about the year 1813, undertook to convince his readers, on grounds of pure theory, that the then existing practice was wrong. "It appears," he says, "from manuscript adjustments in my possession, to have been the practice of Lloyd's in the time of Weskett to allow such damage as general average" (*h*). Weskett, writing in 1781, had said:—"If, to avoid a total loss, the shipwreck, &c. being imminent, the captain and crew should judge it proper to run the ship ashore, the damage thereby occasioned will be a gross (or general) average" (*i*). The opinion of

(*h*) Stevens, Chap. 1, Art. 2; p. 31 of 5th edit. Stevens cites on the same side the *Consolato del Mare*,

Roccus and Magens.

(*i*) Weskett, Insurance, tit. General Average, § 17.

lawyers in his day, Stevens admits, was in favour of such claims; so were the old writers, as far as he had traced them. "In the absence of modern authority," he goes on, "we have only argument against it, but this is strong." The arguments he used for this purpose must indeed, one would think, be strong; they were convincing enough to have for many years transformed a practice of Lloyd's. So far, however, from being impressed with their strength, it is more likely at the present day that the reader will agree with Hopkins, who says, concerning these arguments:—"The reasoning which supports our practice is very curious, and serves to show how an argument that will not hold water is relied upon and left unquestioned through a long series of years" (*k*). Stevens's chain of reasoning is this—general average must be something of the same kind as a jettison of cargo; now in jettison some particular thing is selected for destruction, but in voluntary stranding no particular thing is selected for destruction, since when you run the ship ashore you cannot tell which particular part of the ship or cargo may suffer. Again, before jettison, there is time for deliberation and perhaps choice between alternatives; in voluntary stranding, when the crew expect every instant to see the ship dashed to pieces, the danger is so overpowering that they can think only of saving their lives (*l*). A little later he adds another argument, as bearing on the case when a ship is run ashore to avoid the pursuit of an enemy, viz., that the point is governed by the decision in *Covington v. Roberts* (*m*), which establishes that damage

(*k*) Hopkins, *Average and Arbitration*, p. 35. The author, in his fourth edition, p. 80, has somewhat [altered his] language, but leaves his

judgment substantially the same.

(*l*) Stevens (5th edit.), pp. 32, 33.

(*m*) (1806), 2 Bos. & Pul. (N. R.) 378; *ante*, § 25.

done by carrying a press of canvas for that purpose is not general average. These are certainly, as Hopkins says, arguments that will not hold water. It is true that the whole law of general average has probably been constructed upon the basis of jettison, and by analogies drawn from it; but this has been done by excluding from the analogy, one after another, those circumstances which were immaterial to the principle involved; whereas Stevens's way of reasoning might with equal justice be used to exclude from general average the cutting away of a mast, because a mast is not thrown overboard but cut away, or because a mast is not carried on freight. If a thing was really sacrificed, what does it matter whether it was selected from other things, or whether it was the only thing that would serve; or, again, if you expose twenty things to a risk, knowing that only two or three things will suffer, and not knowing which of them it will be, must you not give compensation to the one (or two or three, if it be so) which eventually suffers, just as if you had known beforehand, and had selected and thrown out that one only?

Benecke.

Benecke, who wrote shortly after Stevens (in 1824), dissents from him to a certain extent. It is not necessary, he says, to constitute a general contribution, that a specific thing should be devoted to certain and inevitable destruction. This he shows by the illustration of the loss of goods which for the general safety have been removed to a barge, and are lost by its sinking, which, though there was no intention to destroy them, nor was this one barge-load in any way selected for destruction amongst the several barges which have escaped unhurt, is yet confessedly the subject of general average. We have now a more modern instance of the same kind, viz., damage done to goods by water poured

into the hold to extinguish a fire. But Benecke has his own favourite theory, that there can be no general average where there is no alternative course—a theory, the modicum of truth contained in which has since been extracted, and placed in a precise form, by the Court of Appeal in *Shepherd v. Kottgen* (n), a form in which it does not in the least support Benecke's conclusion. That conclusion is, that, "If the situation of the vessel were such as to admit of no alternative, so that without running her ashore she would have been unavoidably lost, and that measure would have been resorted to for the purpose of saving the lives or liberty of the crew, no contribution can take place, because nothing, in fact, was sacrificed."

"But," says Benecke, "if the vessel and cargo were in a perilous but not a desperate situation, and the measure of running her ashore were deliberately adopted as best calculated to save the ship and cargo, in that case the damage sustained, according to the fundamental rules, constitutes a claim for restitution. Suppose that, a vessel having sprung a dangerous leak, the master, in order to save a valuable cargo, determines to run her ashore in a convenient place, although he might possibly have reached a harbour with the leaky vessel, at least if he had chosen to throw overboard a part of the cargo. Or suppose him to adopt the same measure if, pursued by an enemy, he considers this a more efficacious method of effecting her escape than lightening the vessel by jettison. Here we find all the necessary requisites for constituting a general contribution—imminent danger, a voluntary determination, and a sacrifice; and I can see no reason for distinguishing these cases from that of goods being thrown overboard, or of a mast being cut away in a storm . . . I cannot, for the above reasons, subscribe to the opinion of Mr. Stevens, that a voluntary stranding ought under no circumstances to give rise to general contribution, though I readily admit that more mistakes would be occasioned by considering every case, where the protest states the vessel to have been purposely run ashore,

Benecke's
reasoning.

(n) *Shepherd v. Kottgen* (1877), 2 C. P. D. 585; see p. 589.

as one of general average, than by entirely excluding all cases of that nature" (o).

Arnould's
opinion.

The question has not yet come before the English courts (p). Arnould, however, expresses a confident opinion as to the result if it were raised. "Though the point," he says, "has never been expressly decided in our courts, there seems little doubt that they would hold, in conformity with the great body of previous authorities, that, at all events where the ship is subsequently recovered after a voluntary stranding so as to be able to pursue her voyage, the loss arising therefrom gives a claim to a general average contribution" (q). There is no doubt that, with the exceptions above set forth, the great current of authority sets that way. The *Consolado del Mare*, *Roccus*, *Targa*, *Emerigon*, *Abbott*, are cited by Arnould, who concludes: "There is no rule more clearly established than this by the uniform course of maritime law and usage" (r). Arnould, however, con-

(o) Benecke, *Insurance*, p. 219.

(p) See note (d), p. 154, *infra*. In *Abbott on Shipping*, in the last edition published in Lord Tenterden's lifetime, it is laid down that "damage voluntarily done to a ship by cutting its decks and sides in order to facilitate a necessary jettison, or by running it on a rock, shallow, or strand to avoid the danger of a storm or of an enemy, and the expense of recovering the ship from this latter situation . . . are to be sustained by a general contribution." (5th edit. p. 349.)

Baily, speaking of the practice of excluding such claims, says, "As a general rule, to prevent disputes as to facts, in the generality of cases, *i.e.*, as to the extent of damage done to ship and cargo by running the

ship ashore, and the extent done to them irrespective of that act, the rule is good; but in those cases where the facts are not disputed it is inequitable, and might be overthrown by a legal decision." (Baily, *Gen. Av.* (2nd edit.), p. 41.)

(q) Arnould *Ins.* (2nd edit.), p. 917.

(r) Arnould, *Ins.* (2nd edit.), p. 915. The learned editor of several later editions of Arnould's work, Mr. Mac-lachlan, takes a different view, holding in this matter with Stevens. "The condition of the whole adventure," he says, "is confessedly desperate; and recourse is had to that which cannot be called, for it is not even hoped to be, an alternative. Whether the result may be the destruction of the whole, or the saving of something, is a mere chance

siders the point would be more doubtful, supposing that after and in consequence of the stranding the ship becomes a total wreck (*s*).

The subject has been dealt with very thoroughly in the courts of the United States, and these decisions appear to deserve a much fuller examination than they have yet received in any English treatise on the subject. American decisions.

The two first of them were tried in 1812,—perhaps while Stevens was writing his book,—one in the Supreme Court of Pennsylvania, the other in that of New York.

In *Sims v. Gurney*, tried in Pennsylvania, the ship *Woodrop Sims* was lying at anchor in a bay when a violent gale came on, and one of her chains parted. The master then asked the pilot what was to be done in case the remaining chain should part, to which he answered, “If the chain does part, I can do nothing with her but run her ashore to the eastward.” The chain did part, whereupon two sails were set, and an attempt was made to fetch out to sea; but this proved impracticable, and she was run up the bay again. The master said to the pilot: “As we must go ashore somewhere, had we not better put her on Cape May?” The pilot said he would try. She was with difficulty run *Sims v. Gurney.*

that defies ingenuity or calculation. The act of putting the helm about to accomplish it is a blind throw for life. The whole adventure is the stake played. And to risk the whole upon the turn of a die does appear to be utterly reckless, and not to be justified in view of the law except under the desperate circumstances of wreck.” (6th edit. p. 874.) Does this mean that the act is not general average because there is no alternative, and therefore the act *must* be done, or because it is reckless, and therefore *ought not* to be done? It

can hardly be both at the same time. If it sometimes is one, sometimes the other, may there not also be times when it is neither; that is to say, when the ship might by possibility be saved without running aground, yet the chances against it were so strong that it was prudent and right to run the ship aground? If this is possible—and it certainly is conceivable—Mr. Macleachlan’s argument leaves all these cases unprovided for.

(*s*) Arnould, Ins. (2nd edit.), p. 917.

ashore on Cape May, and was eventually, after the storm abated, got off, though with damage to the hull by grounding. At the trial the pilot stated that his motive for running the ship ashore on Cape May was, to get the most convenient place to save the ship, crew, and property; that if her course had not been changed she must have gone on Egg Island Flats; that all the men in existence could not have prevented her going on shore—if not run ashore she must have drifted ashore; and that when he put her head towards Cape May, he had not an idea she would go there, and told Captain Heath so at the time.

The case was well argued on both sides, and the arguments, which are very fully reported, may be referred to as setting forth the chief grounds of principle which may be urged for and against the admission of such damage as general average. The court were unanimously of opinion that the damage must be so treated. Tilghman, C. J., said:—

“It is said for the defendants that the ship must have gone ashore somewhere, and it made no difference where that shore was; that there was no advantage in taking the course that was taken, and that the ship was exposed to no greater danger than she would have been if the course had not been altered. It is not necessary that the ship should be exposed to greater danger than she would have been, to make a case of general average. It is sufficient if a *certain loss* is incurred for the common benefit. It seems at first view not very reasonable that contribution should be asked for damage occasioned by an act which in fact was for the benefit of the ship; but the law is certainly so, provided the act which occasioned the damage was conducive to the common safety. In truth, if we go to the bottom of the thing, almost every damage to part of a ship, which can be the subject of general average, is for the benefit of the ship. A mast is cut away, in consequence of which the ship is saved: this is clearly a general average, because the cargo is also saved, which would otherwise have been lost” (t).

(t) *Sims v. Gurney* (1812), 4 Binney's Penns. Rep. 513, at p. 526.

*Tilghman,
C. J.*

The case of *Bradhurst v. Columbian Ins. Co.*, tried the same year, drew a distinction, similar to that which now prevails in the law of Germany, between a voluntary stranding followed by recovery of the ship and one followed by a total loss.

*Bradhurst v.
Columbian
Ins. Co.*

A ship at anchor in the Texel having drifted from her anchors in a violent gale, and being in danger of running foul of other vessels, the master cut the cables and ran for the shore. She was steered for the Zuydwall, on approaching which she struck and beat with great violence, and having no anchors or cables she was driven by the violence of the wind high on the shore. Some of the cargo was saved, but the ship became a total loss. An action was brought by the shipowner against his underwriters for a total loss, which was resisted on the ground that the damage by the stranding was the subject of general average, and that, as the ship and cargo belonged to the same person, there should be a deduction for the cargo's share of contribution. The first question, therefore, was, whether this damage formed a general average.

Kent, C. J., said :

Kent, C. J.

"If a ship, in a case of extremity and to avoid impending danger, be voluntarily run ashore, and she is afterwards recovered and performs the voyage, the damages resulting from this sacrifice are to be borne as general average. There cannot be a doubt as to the existence of this rule, for it is to be met with in all the books that treat of contribution. But another and more difficult question is, whether there is to be a contribution from the surviving cargo, if the ship should happen, as in this case, to be destroyed and lost by the act of running her ashore" (p. 14).

The learned judge, then, after citing the various foreign authorities, and concluding that the balance of

their weight is against the claim for contribution if the ship be lost, continues :

“These authorities are founded on sound principles, for the loss of the ship in these cases is more imputable to casualty than design. When a ship is voluntarily run ashore, it does not, of course, follow that she is to be lost. The intention is not to destroy the ship, but to place her in less peril, and if she afterwards goes to pieces, or is otherwise lost, it is not to be attributed exclusively to the act of the master, but to the direct and more immediate operation of other causes. In most cases he has no expectation, and certainly no intention, of destroying the vessel. He does an act hazardous to the vessel and cargo, in order to escape from a more pressing danger, as a storm, or the pursuit of an enemy or pirate. The stranding may be an act done for the common safety, but this cannot be said to be the case of the subsequent shipwreck or capture. Indeed, the very act of running the ship ashore is desperate, and places the cargo in extreme jeopardy; and if it happens that the ship is lost and the cargo saved, it is saved *tanquam ex incendio*, according to the allusion in the Rhodian law. In such a case it is emphatically said to be ‘save who can,’ and to burden the rescued cargo with contribution for the ship would seem to be oppressive, and is clearly not within the policy and equity of the rule” (u).

The court accordingly held unanimously that this loss was not general average.

This decision
not supported.

This decision, it appears, gave rise to much discussion. Exception was taken to it by Mr. Justice Story, in a note to his edition of Abbott on Shipping (x). Decisions diametrically opposed to it were given in the cases of *Cuze v. Reilly* (y), and *Gray v. Waln* (z), both in Pennsylvania. And ultimately, in 1839, the Supreme Court of the United States, by a unanimous judgment,

(u) *Bradhurst v. Columbian Ins. Co.* (1812), 9 Johnson’s N. Y. Rep. p. 9, at p. 16.

(x) 4th (American) edit. p. 349; see Mr. Boardman’s argument in *Barnard v. Adams* (1850), 10

Howard’s S. C. Rep. at p. 273.

(y) *Cuze v. Reilly* (1814), 3 Wash. Cir. Ct. 298; Fed. Cas. 2538.

(z) *Gray v. Waln* (1816), 2 Sergeant & Rawle, Penns. Rep. 228.

formally reversed the conclusion come to in *Bradhurst v. Columbian Ins. Co.*, and established the rule, now universally acted on throughout the United States, that a voluntary stranding is equally the subject of general average, whether the stranded ship is afterwards saved and repaired, or is totally lost by the stranding (*a*).

The case was this: The brig *Hope*, going down Chesapeake Bay, found the weather too bad to proceed to sea, and bore away for a projecting headland in the Bay, called Sewell's Point, where she anchored. On the second and following day the gale increased in violence; the brig dragged her anchors from time to time, till finally she struck on the shoals, and her head swinging round brought her broadside to the wind and a heavy sea. In this situation the captain, finding no other possible chance of saving the ship and cargo, and preserving the lives of the crew, slipped his cables and ran the brig ashore as high up the beach as possible, where, after the storm, she was left high and dry, and there was no possibility of getting her off. The cargo was saved (*b*).

*Columbian
Ins. Co. v.
Ashby.*

The unanimous opinion of the court, that this loss was the subject of general average, was delivered by Mr. Justice Story, who, "after examining," as Arnould says, "all the learning on the subject, from the Digest downwards" (*c*), thus states succinctly the grounds of his decision:

"The intention is not to destroy the ship, but to place her in *Story, J.*

(*a*) "This judgment," says Arnould (2nd edit.), p. 919, "is well worth consulting in the original report." The great lawyer, whose opinion Mr. Justice Story thus overruled, had the magnanimity to say, in his Commentaries, that the law on

this point was finally settled in the United States by this judgment. (Kent's Comm. vol. 3 (edit. 1844), p. 239, note (*b*).)

(*b*) Arn. Ins. (2nd edit), 918.

(*c*) See note at end of this Chapter.

less peril, if possible, as well as the cargo. The act is hazardous to the ship and cargo, but is done to escape from a more pressing danger; it is done for the common safety; and if the salvation of the cargo is accomplished thereby, it is difficult to perceive why, because from inevitable calamity the damage has exceeded the expectation or intention of the parties, the whole sacrifice should be borne by the shipowner, when he has thereby accomplished the safety of the cargo" (d).

Question of fact; what is a voluntary stranding.

To determine precisely what is a voluntary stranding may not always be easy, and several of the American decisions turn upon this question of fact. Thus, in one case, where the captain cut his cable and hoisted sail with the intention of running out to sea, but this failing, by reason of the sail being blown away, the ship became ungovernable and was drifted ashore, this was pronounced not to be a voluntary stranding. "An accidental loss," said Gibson, J., "which happens in an endeavour to bring about a very different event, is not a subject of compensation. . . . If there were in fact an intention to run the vessel ashore, there was no act done in pursuance of it, for the vessel became ungovernable the instant the cables were cut, and was driven on the rocks exclusively by the agency of the wind and the waves" (e). But if, while the master is running the ship for one point on the strand, she takes the ground on another and is lost, that loss is general average. "The third ground," says Sprague, J., "on which it is attempted to distinguish the cases is, that there was no intent to strike on that particular rock. But there was an intent to change the position of the vessel, and to run her ashore in a

(d) *Columbian Ins. Co. v. Ashby* (1839), 13 Pet. 343. In *Iredale v. China Traders' Ins. Co.*, [1899] 2 Q. B. 356, at p. 363, Bigham, J., said, that he believed the English law as to voluntary stranding to

be the same as that laid down in this case.

(e) *Walker v. U. S. Ins. Co.* (1824), 11 Serg. & Rawle's Penns. Rep. 61, at p. 65.

different place from that to which she was drifting ; and the accidental striking cannot be considered as affecting the intent" (f).

In one of these cases, *Barnard v. Adams*, it is laid down in the most unequivocal manner that if a ship must inevitably ground somewhere, and the only act of volition consists in selecting a place for grounding where she will suffer least, this is enough : the damage done is general average. At the trial the facts were admitted ; and it was conceded that, under the circumstances, the grounding at one place or another was inevitable. The counsel for the plaintiff put his argument broadly on the ground that in that respect the present claim was on the same footing as every other general average sacrifice.

Barnard v. Adams.
Stranding voluntary if place selected, though ship must ground somewhere.

(f) *Rea v. Cutler* (1846), 1 Sprague, 135.

In *Sturges v. Cury* (1854), 2 Curtis, Cir. Ct. 59, the vessel was dragging her anchors, and in great danger of being beaten to pieces on the rocks before she reached the shore. The master slipped his anchor and let her ground on the beach, and the cargo was saved. It was held that the loss of the ship was general average, though the actual place of stranding was not selected. "What is denominated a sacrifice," said the court, "means not that its subject is destroyed, or even subjected to a greater danger than before, but that it is selected to suffer alone, and thus avert the common peril."

In *The Star of Hope* (1869), 9 Wall. 203, the vessel was on fire close to a rocky shore, on the Patagonian coast, where she could not be beached. The master determined to run her into a bay unknown to him, and in doing so she grounded and struck fast and was damaged, but the water which she made in consequence of

the damage put out the fire, and eventually both ship and cargo were saved. The Supreme Court held that there was a voluntary stranding, although the master did not know of the existence of the particular bank on which the ship grounded, as he was aware of the possibility that she would ground. It is not stated in the report that the master intended to run the ship ashore in the bay. If he did not, the ground of the decision, viz., that the stranding was voluntary, is open to criticism; but the decision itself may be justified on the ground that going into the bay was a general average act, of which the damage suffered by the ship was the consequence.

It has been held that where the intention was to run the vessel ashore on a sandy beach, which turned out contrary to the master's belief to be mud, the resulting damage was general average. (*Norwich and N. Y. Transport Co. v. Ins. Co. of North America* (1902), 118 Fed. R. 307.)

"The idea," he said, "that any of the sacrifices at sea in times of peril are voluntary, in any ordinary sense of the word, is quite erroneous. It is an act of the will under the sternest pressure of necessity. The alternatives are, total loss if nothing is done, a lighter loss if the danger is hastened. This is all the choice. . . . It is, nevertheless, all the voluntary act which remains to the master to perform. On its being performed with coolness, courage, and discretion, the whole property, and the lives of all, depend. That this small amount of volition may be exercised freely and without hesitation, the policy of the law tenders to the officer the indemnity of a general contribution" (g).

And this was the view taken by the majority of the court.

Grier, J.

"The assertion, so much relied on in the argument," said Grier, J., "that if the peril be inevitable there can be no contribution, seems, when more carefully stated, to be this: that, if the common peril was of such a nature that the *jactus*, or thing cast away to preserve the rest, would have perished anyhow, or perished *inevitably*, even if it had not been selected to suffer in place of the whole, there can be no contribution. If this be the meaning of the proposition, and we can discover no other, it is a denial of the whole doctrine upon which the claim for general average has its foundation. For the master of the ship would not be justified in casting a part of the cargo into the sea, or slipping his anchor, or cutting away his masts, or stranding his vessel, unless compelled to it by the necessity of the case, in order to save ship and cargo, or one of them, from an imminent peril which threatened their common destruction. The necessity of the case must compel him to choose between the loss of the whole and part; and, however metaphysicians may stumble at the assertion, it is this forced choice which is necessary to justify the master in making a sacrifice (as it is called) of a part for the whole. . . . If the case does not show that the jettison was *indispensable*, in order to escape the common peril, the master would himself be liable for the loss consequent thereon. . . ." The learned judge illustrated this by the case of a jettison. "But suppose," he added, "the ship cannot be saved by casting the cargo into the sea, but the cargo, which is of far greater value, can be saved by casting the vessel on the land,

(g) *Barnard v. Adams* (1850), 10 Howard's S. C. Rep. 270, at p. 286.

or stranding her, . . . the imminent destruction of the whole has been evaded, as a whole, and part saved, by transferring the whole peril to another part" (*h*).

Daniel, J., dissented; but the other judges concurred with Grier, J.

Notwithstanding the authority due to this decision, which, as Daniel, J., said in his judgment, being "the revised and re-affirmed doctrine of the Supreme Court of the United States, must control the question of general average in the courts of the United States," we should apparently not be warranted in concluding—as this judgment by itself would naturally lead us to conclude—that in America every case of voluntary stranding is treated as a general average. This is not the conclusion drawn either by Phillips or Parsons. The former says, in effect, that in these questions we always have to inquire whether the stranding as determined by volition is or is not the *same stranding* as that which was inevitable in case there had been no interference of volition; a question, he observes, of fact and not of doctrine, and one not easily answered in some cases (*i*). Parsons cites in a note some portions of the judgment of Ellsworth, J., in a case in the Supreme Court of Connecticut, which I had passed over, regarding them as mere *obiter dicta*, and, having regard to the context (*k*), as of no great authority; but which, for the sake of completeness, I will here set forth:

Opinion of
Phillips.

*Slater v. Hay-
ward Rubber
Co.*

(*h*) *Ib.* at p. 304.

(*i*) 2 Phill. Ins. § 1313. This view is borne out by a fairly recent case, (*Shoe v. Low Moor Iron Co.* (1891), 49 Fed. R. 252.) The ship was dragging her anchor and was bound to go ashore; the master slipped her cable and voluntarily stranded her, but (it was found) in substantially the same place and with the same results

as would have followed from the dragging. It was held that this was not a case for general average.

(*k*) There are several things in this judgment somewhat paradoxical, *e.g.*, the remark that fire is not such a peril as can give rise to a claim for general average. But the passage quoted presents an argument which has in itself great force.

—“Now to me,” said the learned judge, “it seems little less than a paradox that if a captain whose vessel is doomed to destruction by stranding, should consider and select, for his compulsory going ashore, the place least perilous to himself and vessel, and least destructive to what might happen to escape the general destruction, such preference is the incurring a voluntary sacrifice which entitles him to call for contribution. ‘Save himself, who can,’ is a maxim much more applicable to such a case. When a captain finds that his vessel must go on shore, and he exerts himself to go on in a safer place rather than a more dangerous one, he no more makes a voluntary sacrifice than when, in navigating his vessel, he chooses a safe channel rather than a more hazardous one, or changes his course to avoid a rock or shoal. He does his plain duty to the general interest to mitigate an unavoidable calamity, but not at all in any sense to make a loss by selecting a part to be sacrificed in order to ensure safety to the rest (*l*). And, conformably rather to the doctrine here laid down as a mere dictum (for the question before the court for decision was not one of voluntary stranding, but of jettison from deck) by the court of a single State than to the express decision of the Supreme Court of the United States, Parsons sums up the principle which he thinks must govern all these cases as follows:—

Opinion of
Parsons.

“There must be a voluntary sacrifice of some positive value. If, then, the ship must inevitably be cast upon the shore, and all that the master does is to select a place, a time, or a mode of stranding her, we should say that this is not that voluntary sacrifice which the law of general average requires, and therefore is not an average loss. All that the master did was to strand in such a way as to give him a better hope of saving the ship itself, her cargo, and the

lives of those on board. Moreover, if the ship is to be contributed for, it should only be on the value which she possessed at the time and in the condition in which she was when the captain, abandoning all other hope, endeavoured to choose his place; and this value would seem to be, in the case supposed, nothing. But if the master had a substantial and valuable chance of saving the cargo, then the cargo should contribute to repay the loss, although the chance thus thrown away was less, and even much less, than a probability" (*m*).

I may [said Mr. Lowndes] conclude this collection of materials for forming a judgment on the question by pointing out that, at present, the practice in this country is in a very unsettled state, and opinions are by no means agreed. [The English average adjusters, however, adhere in practice to the rule of their Association, which has already been cited (*n*).]

State of law
in this
country.

When a ship is voluntarily stranded, or scuttled, in order to extinguish a fire, there have been several cases in which the damage done to the ship by the stranding has been treated by adjusters as general average, and settled without dispute (*o*).

Stranding to
put out fire.

A large steamer, *The Senegal*, having on board a very valuable cargo, and many passengers, was skirting the coast of Grand Canary, intending to call at Las Palmas, a port on the north end of that island, on her return voyage from Africa for Liverpool, when unfortunately she struck or grazed on a sunken rock not laid down in the chart. Her way was not stopped, but a large rent was made in the plates of her side below water, through which the water rushed with such force that the master feared that, though she was then only

Case of *The
Senegal*.

(*m*) 2 Parsons, Ins. p. 243.

(*n*) *Ante*, p. 144.

(*o*) In *Papayanni v. Grampian S.S.*
(1896), 1 Com. Cas. 448, Mathew,

J., held that the damage to cargo by scuttling a burning ship must be treated as general average.

about twelve miles from Las Palmas, she would sink in deep water before reaching it. He could not be certain of this, but the risk was too great to run, especially considering the risk of life. Accordingly, seeing a sandy beach to his lee, he caused the ship's helm to be altered, and ran her aground, high on the beach, on the coast of Grand Canary, about nine miles south of Las Palmas. She remained in that position, before she could be floated, for about three weeks; during which time, from pounding on the sand, and on the rock which proved to be underneath it, her keel and forefoot suffered considerable damage. Eventually she was got off, and brought home most of her cargo.

In this case the damage done to the keel and forefoot, with other damage done to the ship and cargo in the lower hold by the voluntary stranding, was treated by the adjuster as general average. This having been disputed, it was agreed that the question should be determined by a referee to be appointed by the chairman of the Adjusters' Association. The chairman appointed a queen's counsel, eminent especially in matters of insurance; and this referee pronounced that the damage was rightly so treated. This was in the year 1882.

York and
Antwerp
Rules.

Turning back for a moment to the years 1860 to 1876, this subject engaged the attention of the adjusters and other representatives of commercial interests in Europe and America, at the several meetings which led to the construction of the York and Antwerp Rules. At York, in 1864, it was resolved: "When a ship is intentionally run on shore because she is sinking or driving on shore or rocks, no damage caused to the ship, the cargo, and the freight, or any of them, by such intentional running on shore, shall be made good as general

average." And the York rule was adopted in 1876 at Antwerp. It was understood, I believe, that this rule was only applicable to a stranding *in extremis*, when a loss was inevitable, and it may be read in this sense; but the vagueness of the terms used is to be regretted. [The rule was modified at the Liverpool Conference in 1890, and the present rule is as follows: "When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average."]

The question has also been several times discussed in the Adjusters' Association (*p*). An attempt, in 1881, to carry a resolution broadly pronouncing all damage caused by voluntary stranding to be general average, was negatived: so was a resolution, proposed in 1883, to treat in that way damage done by a voluntary stranding, when the object was to prevent the sinking of a ship, and when the stranded ship was subsequently floated. Eventually, in 1884, on the suggestion of the late lamented William Richards, a resolution was brought forward in the following terms: "That a voluntary stranding, when it involves a real sacrifice, gives the right to contribution as general average." This resolution was twice carried by majorities, first as a probationary rule by 15 to 11, and then, on confirmation, as the rules require, the year following, by 13 to 12.

Adjusters'
Association.

(*p*) See their printed Reports of pp. 65—80; 1884, pp. 38—40; and Proceedings, 1881, pp. 33—43; 1883, 1885, pp. 24—27.

This latter majority, however, not amounting to the requisite two-thirds, it does not stand as a rule binding on the members.

Conclusion.

Having thus, to the best of my ability, put together the materials for forming a judgment on this yet undetermined question, all that remains is to set down the opinion I have myself formed as to the right method of treating these cases as they arise in practice, pending further instructions from the Superior Courts.

Must be a
real sacrifice.

To constitute general average there must be a sacrifice, a something *quod datum est*, and this, of course, must be real; conversely, whenever there is a real sacrifice or thing given for the whole, that which is so sacrificed or given must be replaced as general average. So far the English courts have distinctly pronounced themselves to be in accord with the rest of the world. The resolution of the Association is, indeed, not simply true, but a truism. It has a value, however, in that it calls attention to the fact that the difficulty of laying down one common rule for voluntary stranding lies in this, that in some such strandings there is, and in others there is not, a real sacrifice. Take, for example, the American case, above set forth, of *Barnard v. Adams* (q). There, it was admitted that the ship must take the ground somewhere, and all that was done was to choose a place where she should suffer the least hurt. Where is the sacrifice? What, in any sense, can be said to have been *given* for the whole? The arguments on either side are before us; but I do not find those of the court, authority apart, to be satisfactory. It can hardly be admitted that the master's authority to make a sacrifice, *e.g.* a jettison, is

Barnard v.
Adams ques-
tioned.

limited to the case in which the ship must *necessarily* be lost if he does not make it; it surely suffices if the risk of loss is so great that a prudent man would prefer the certain loss of, or all but certain damage to, a part to that degree of risk of losing the whole. In jettison it may almost always be truly said that, however desperate the danger to the ship, the goods would be better off, and have a better chance of safety, if left where they are, than if thrown into the sea; in jettison, therefore, there almost always is a real sacrifice—so nearly always, indeed, that the small residuum may be ignored for the sake of a general rule. In cases like that of *Barnard v. Adams*, on the other hand, where it is admitted, or where it can be proved, that a grounding somewhere is *certain*, there is no part either of the ship or cargo which is in a worse position, or exposed to a greater peril, by being placed on a soft or smooth bed rather than on one rockier or more uneven or more exposed to the weather (*r*). No part, then, either of the ship or cargo, is in any sense sacrificed, and the analogy with jettison seems completely to break down. It fails, not in the way Stevens en-

(*r*) The argument is questionable. A measure is taken which exposes one part of the adventure to a greater risk than the rest (see next page). The one part has thereby been lost or suffered damage, the rest has been placed in safety. This seems *primâ facie* a sufficient reason for allowing the loss or damage in general average. The argument that no part of the adventure has been placed in a worse position than before is unsound, if, as Mr. Lowndes remarks in discussing another, but analogous, class of cases, it is “beside the question to inquire as to the ultimate fate of the whole adventure in case the sacrifice were

not made.” (*Infra*, p. 165.) The narrower argument that the thing sacrificed is not in a worse position than before would be a legitimate one only in the case of “wreck”; and Mr. Lowndes has himself supplied an answer to the argument that this case should be treated as one of wreck. (*Infra*, p. 165.) It is submitted that the distinction which Mr. Lowndes draws between a voluntary stranding to escape from stranding in a different place, and a voluntary stranding to escape from a loss by a different peril, cannot be maintained.

deavours to make out a failure for all cases of voluntary stranding, not in this or that circumstance which may be unessential, but in that which is confessedly of its very essence, viz., in the absence of a sacrifice for the whole (*s*).

A second class of cases stand on different ground, viz., where it still is admitted or can be proved that, unless the ship be run ashore, her loss is certain or inevitable; not, however, her loss by running ashore in some other place, but some other kind of loss, one affecting the ship and all the cargo equally, *e.g.*, by sinking in deep water, by burning, or capture by an enemy or pirate. Stranding, as has been pointed out, in the great majority of cases at least, is an exposure of the bottom of the ship, and the cargo near the bottom, to a risk of damage out of all proportion to the risk run by the upper portion of the cargo; it may in these cases, therefore, when the alternative is a total loss, be properly described as the giving or sacrificing of a part for the preservation of the remainder. Is it less a sacrifice because if not made the total loss was certain? Here the analogy of jettison, of cutting away a mast, and indeed

(*s*) As to the conclusion arrived at in this paragraph, see Carver's *Carriage by Sea*, §§ 387, 388. Mr. Carver, said Mr. Lowndes, is of opinion that even in this, which is certainly the weakest case, the loss should be treated as general average. [But it is not clear that Mr. Carver differs from the view expressed in the text, although in the earlier editions of his work he criticised a view which Mr. Lowndes modified in the last edition of this work. Mr. Carver's opinion is that a loss by voluntary stranding is general average. He qualifies this opinion, how-

ever, by saying that "it does not seem reasonable to call that voluntary which merely anticipates a clear necessity. If the ship is on the point of going on the rocks, the stranding does not become voluntary because the master chooses to go stern on to them instead of broadside, or at one spot rather than at another." See Carver, 4th edit. § 388.] Mr. Mac-lachlan, for reasons which, said Mr. Lowndes, "are to me simply unintelligible," thinks (*Arn. Ins.* (6th edit.) pp. 873-4) that damage by voluntary stranding should in no case be treated as general average.

of every other sacrifice of a part for the whole, properly comes into play. In none of these cases are we ever called on even to consider the question whether a loss, if that particular sacrifice had not been made, was inevitable. In all these cases we act on the principle, the greater the danger, the greater the merit of the sacrifice. And that this principle is fully recognized in our courts of law may be seen—to take nothing else—by reference to the judgments of Bramwell, L. J., and Brett, L. J., in *Shepherd v. Kottgen* (*t*), where it is said by the former that, to constitute wreck, there must be some peculiar condition attached to the thing sacrificed, owing to which it will be lost whether the whole adventure is saved or not (*u*); and by the latter, in all the various tests of wreck, the learned judge lays down, there is contained a condition virtually the same viz., that the thing cut or cast away must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away (*v*); both implying that it would be beside the question to inquire as to the ultimate fate of the whole adventure in case the sacrifice were not made. Judged by the tests here laid down for our guidance, it may confidently be asserted that, in the case here supposed, the sacrifice would not be excluded from general average by our courts on the ground of its being a case of wreck; for, at the time when the grounding was resolved upon, no part of the ship or cargo had any such “peculiar condition” attached to it, or was in such a state that it must itself certainly be lost, although the rest of the adventure should be saved without the grounding. In cases of

(*t*) *Shepherd v. Kottgen* (1877), 2
C. P. D. 585.

(*u*) See *ante*, p. 124.

(*v*) See *ante*, p. 125.

this kind, then, it would seem that the damage by stranding should be treated as general average.

There remains a third and by no means unimportant class of cases, viz., those in which it is not admitted, nor can be proved, that the loss of the whole, if the ship had not been run aground, was certain or inevitable. The case of *The Senegal*, above set forth(x), is a very good illustration. Such cases are no doubt infrequent: perhaps more than ever so in modern times, when ships are so costly, and so liable to injury from taking the ground, that the measure is only resorted to in extreme urgency. But, in cases like *The Senegal*, the balance both of reason and authority is so overwhelmingly in favour of treating the loss as general average, it so nearly approaches a moral certainty that any court of law would so treat it, that, if I were advising an adjuster how to act in such a case, I should say that he would run a very grave responsibility in treating it otherwise.

Ought, however, a distinction to be made in case the ship is not ultimately saved? In considering this question, it may be well first to clear away what may be called the unsound reasons for drawing such a distinction. The completion of the voyage of the ship with the cargo is immaterial; the motive which constitutes general average being, not the completion of the common adventure, but the rescuing of the whole, or of so much as can be rescued, from an imminent danger, it is enough that the cargo, or a part of it, has been rescued, and brought for the time into safety. Provided the act of running the ship ashore was judicious—and unless it were, there is no general average in any case—the loss really caused by that act is not the less to be replaced by contribution because that loss is heavy than if it

(x) *Ante*, p. 159.

were lighter. As a matter of principle, the only question to be asked, when the stranding is followed by the loss of ship, is, whether that loss was really, in a strict sense, *caused* by the stranding. Was that loss *given*, or intended, or the natural consequence of the stranding? The answer to this question may be different in different cases, so that it is difficult to lay down one general rule for all. It is indeed, at present, difficult to lay down a rule for any; since at present there exists in English law no authoritative answer to the question—How far are the *consequences* of a sacrifice to be treated as general average? I do not say that there are no answers, but none that are authoritative, because none which cannot be confronted by decisions opposed to them; none, therefore, as to which all our judges are agreed, as will be more clearly seen in the following chapter. We may have, for example, such a case as the following: A ship, pursued by an enemy, is compelled for her safety to run aground, we will say under the guns of a fort, where she is safe from the enemy's fire. This takes place during fine weather, and the only consequences at the time to be anticipated, and in fact expected by the master, were the cost of unlading the cargo to float her, and perhaps some slight damage to the bottom of the ship. But before the unlading of the cargo can be completed, a gale from seaward springs up, and the ship, in her exposed position, is battered to pieces on the strand. Is this loss to be treated as the effect of the stranding, and therefore as general average, or as the effect of the subsequent gale, and therefore as accidental? This is an extreme case, but I think it will be found that difficulties analogous to this constitute the only real difficulty of dealing with cases of voluntary stranding, followed by a total loss of the ship. I sup-

pose the answer to all of them should be, an exposure to extraordinary risk, followed by actual loss, must be treated as a sacrifice; and when the master puts his ship ashore, knowing that she must remain fast for some time, he must be taken to have deliberately exposed her to whatever damage she may suffer from the vicissitudes of the weather during that time. Even in the case put, therefore, I should be inclined to treat the loss of the ship as general average. But one cannot say, with absolute confidence, that an English court of law would so treat it (*y*).

(*y*) Mr. Carver comes to virtually the same conclusions on the law of voluntary stranding with those here expressed. (Carriage by Sea, §§ 387. 388.)

There is a passage in Serjeant (afterwards Mr. Justice) Shee's edition of Abbott, which is exactly in accord with the principle laid down in the text, but which in the case here supposed would evidently lead to the opposite conclusion. I quote the whole, more particularly because of the value of the opening sentences, which exactly and forcibly lay down what there can be no doubt is the true principle. Abbott himself merely says:—"Supposing the cargo to be saved and the vessel totally lost by such voluntary stranding, are the rescued goods to contribute for the ship? Upon this subject great diversity of opinion exists among foreign jurists. The question does not appear to have ever directly arisen in our courts; and although some English writers on marine law have determined it in the negative, their opinion has not obtained a general or unqualified concurrence." Serjeant Shee, commenting on this,

says:—"In the simplest illustration of the rule, the case of jettison, unless the goods were voluntarily *given* for the common safety, there is no contribution. If contribution be claimed for a mast or a cable cut, they must have been *given* for the safety of all. Repairs must fall upon the owner, unless the damage was submitted to and *given* for the common good, or the cost of reparation incurred for the sake of the cargo alone. In the case of a total wreck, consequent upon a voluntary stranding, can the ship be said to have been deliberately sacrificed? In the great majority of cases, certainly not. A vessel is not sacrificed for the purpose of destruction; that course is resorted to with the intention and in the hope of saving her from imminent peril. The sacrifice really intended to be made is, in most cases, the cost of the damage which may be expected from the stranding, and the expense of getting the vessel off; the total loss is occasioned by circumstances which were not foreseen when the stranding was determined on." (Abbott on Shipping (8th edit.), p. 491.)

NOTE.

Older Authorities on Voluntary Stranding.

Phillips, in a note (2 Phill. Ins. p. 85, n. (3)), has collected the authorities on this subject. These, with the exceptions noted, I have examined in the originals, with the following results. The reference to the Digest, l. 3, has nothing whatever to do with the matter; the Digest merely says that if a mast or other *instrumentum navis* is cut away for the common safety, it is general average. The reference to the *Consolato del Mare*, so far as I can make out, proves merely this, that in those old times when the merchants sailed in the ship, it often happened that, before putting his ship aground, the master would consult with the merchants, and it was often or perhaps commonly agreed amongst them that, if he did, the damage done should be shared by contribution, and the Consolato directs that such agreements shall be strictly enforced. The same thing seems to have been done when cables were slipped, or other sacrifices made when there was time for such deliberation. The chapters referred to (192 and 193) have, as numbered in Pardessus, no reference to our subject; but the chapters are differently arranged in different editions, and I can only suppose that those referred to by Phillips are the following:—Chap. 66 (111), after saying that in case the merchants shall have gone ashore, as when the ship is lying off a harbour, a storm shall spring up, or a cruiser come in sight, and it shall become necessary for the captain in the absence of the merchants to make some sacrifice for the common safety, this is to be treated as it would have been had the merchants been present and consented, proceeds as follows:—"Much more, if there should happen the misfortune that the ship, by reason of armed vessels or of tempest, were obliged to be run ashore, the captain acting or having acted in this manner by the advice of the above-named [his officers and crew], and with their knowledge and consent, every bargain or agreement that he shall have made with them and in the manner aforesaid cannot be called in question (*contesté*) by any merchant, or by anyone else." (2 Pard. 113.) And, again (Chap. 67 (112)):—"The merchants are bound to pay, by *sou* and by *lierc*" (*i.e.*, in proportion to values) "every expense which it has been agreed to make relatively to the merchandize except the cost of their loading. If then it is necessary to lift the anchor, for bad weather or other accident, that is to say, to enter into a port

or harbour, or into a place in which one may save either the goods or the ship, in this case one merchandize should answer for the other by *sou* or by *livre* or by *besant*. . . . This chapter has principally for its object to indemnify the ship for that which one has promised to restore to it; for the ship has this privilege that, if the merchants promise to indemnify it in any matter, they are bound to keep this engagement, written or not, provided the scribe (*écrivain*) were present and has heard it; and the scribe is bound to write it as soon as the ship has cable to ground, since he was in full sea when the agreement was made." (2 Pard. 114.) This is all I can find in the Consolato bearing on the matter. The

Guidon.

Guidon de la Mer, I may observe in passing, and the Ordonnance of Louis XIV., say nothing whatever concerning voluntary stranding. Tit. 7, Art. 6, which is referred to by Phillips, throws light on the matter only by saying nothing about it. Valin, in his note on this article, supplies the omission by saying: "*Il faut ajouter que, si, pour éviter une perte totale, le naufrage étant imminent, le capitaine prend le parti de faire échouer le navire, le dommage que le vaisseau aura souffert, et causé par-là, sera avarie grosse et commune.*" And for this he cites Consulat, Chaps. 192 and 193; Roccus, pp. 62, 234, 300; and Casaregis, Disc. 45, No. 60 *et seq.*

Valin.

Emerigon.

(Valin, edit. 1829, p. 586.) Emerigon is to the same effect: "*Il arrive quelquefois,*" he says, "*que, pour se dérober à l'ennemi, ou pour éviter un naufrage absolu, on fait échouer le navire dans l'endroit qui paraît le moins dangereux. Le dommage souffert à ce sujet est avarie grosse, parce qu'il a eu pour objet le salut commun.*" And for this he cites Valin, and the authorities cited by him, and also Targa, cap. 76, p. 317. (Emerigon, Ass. Chap. 12, Sect. 13, vol. 1, p. 405, of Boulay-Paty's edit. 1827.) Roccus, Casaregis, and Targa I have not seen. "Stranding accompanied by *bris* (breaking-up)," continues Emerigon, "is a species of wreck (*naufrage*)" (same page). And the force of this is made clearer in a later section, where he says: "Damages occasioned by stranding are particular averages for account of the owners. But it would be general average if the stranding had been voluntarily effected for the common safety, as we have seen above" [referring to the passage above set forth], "provided always, that the vessel has been set afloat again; for, if the stranding has been followed by shipwreck, it is *saue qui peut*." (Chap. 12, Sect. 41, vol. 1, p. 600.) For this latter statement Emerigon gives no authority, but says only, "See below, § 4, where I speak of the case where the jettison

does not save the ship." Turning to this section, we find it laid down, on the authority of a passage in the Digest, that if cargo be thrown overboard, or a mast be cut away, there shall be no contribution unless the ship be saved. (Emer. vol. 1, p. 601.) We seem here to have got to the original source of this distinction made, in cases of voluntary stranding, between the cases in which the ship is got off and that in which she becomes a wreck. It is to be found nowhere earlier than in Emerigon, and by him is almost expressly traced to the more general principle (now much modified) that there shall be no contribution unless the ship be saved. There is no use in following the stream of precedent, in which one author servilely copies his predecessor, now that we have got to the fountain-head.

CHAPTER IV.

EXTRAORDINARY EXPENDITURE.—PART I.

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Division
between
sacrifice and
expenditure.

§ 37. It has been pointed out (§ 2) that the so-called definition of general average laid down by Mr. Justice Lawrence, which divides it under the heads of sacrifice and extraordinary expenditure, is virtually borrowed from the Ordonnance of Louis XIV., and is no more than an expansion of the *quod pro omnibus datum est* of the Rhodian law. Before an expenditure can be properly *given* for all, it must be in some sense extraordinary ; since every expense incident to the ordinary prosecution

of the voyage has been already purchased, being included in the stipulated freight, and therefore may be paid but cannot be said to be *given*. The shipowner, having undertaken to carry the cargo to its destination, would be liable to bear the whole expense of doing so, were it not for the reservation he has made, "the accidents of navigation excepted;" so that he can only demand contribution for such expenses as are incurred, for the benefit of the cargo together with the ship, in respect of this reserved portion of the contract.

Except as thus understood, the sub-division of general average losses into sacrifices and extraordinary expenditure cannot be considered a very happy one (*a*). Some sacrifices, as for example, most damage done to a ship, must be reduced into the form of expenditure before it can be replaced by contribution. On the other hand, expenditure as such can never save a ship: that which saves her is the adoption of some extraordinary measure, or some measure taken under extraordinary circumstances, which involves or leads to expenditure, out of the common course, because the measure itself is out of the common course. It would seem a more accurate classification to say that a general average must be the result of a sacrifice, which may be either of the cargo or of the ship, or may consist in the adoption of some course of action, out of the common course, and which the captain was therefore not bound to adopt, but the adoption of which must lead to an increased expense.

(*a*) The Germans, in the conferences which preceded the construction of their code for the empire, resolved to omit the word "extraordinary" from their definition for two reasons; first, because it might occasionally mislead, and secondly, because the true character of a general

average expenditure was adequately described without it, in saying that it must be "an expenditure incurred for the purpose of rescuing the ship and cargo from an imminent danger." (Ulrich, *Grosse Haverei*, p. 4.)

This is only here set down, because practical consequences, as we shall see in the following chapter, have probably resulted from the inaccuracy here pointed out in our definition.

The subject of extraordinary expenditure, treated in detail, may for convenience be divided under the following principal heads. First, expenses occasioned by measures taken to rescue a ship which has met with some serious disaster, such as being sunk, stranded, on fire, or in collision, and is rescued from the imminent danger of total loss by salvage services, or services analogous to salvage. Secondly, expenses incurred by bearing up for a port of refuge, in order to repair a ship or otherwise to avert a danger threatening ship and cargo if she were to remain at sea. Thirdly, expense, or loss substituted for expense, incurred in order to raise funds for defraying expense necessary for either of the two preceding heads. These heads, though properly belonging to the same main division of our subject, are for convenience, on account of their length, divided under two chapters.

PART I.

SALVAGE CHARGES.

I. *Of salvage in general.*

§ 38. As jettison is regarded as the type or simplest form of a general average sacrifice, so salvage, it has been said, may be regarded as the type of a general average expenditure. This, however, is only from one point of view. Salvage is always an extraordinary expense, and is always incurred in order to rescue the thing salved from danger: in these respects it is a per-

fect form of general average expenditure; but it is not always incurred for the common safety of ship and cargo. Whenever it is so, it is general average (*b*).

The law of salvage has been considerably developed in the Admiralty Court. One or two of its incidents throw some light on the subject of general average; and these may be briefly noted here.

Admiralty
decisions.

The master of a ship has authority, in case of need, to engage the assistance of salvors (*c*), and to bind both

Master's
authority as
to salvage
contracts.

(*b*) The editors point out that, strictly speaking, salvage in the proper sense of the word, *i.e.*, the reward recoverable by salvors under maritime law, independently of contract, is not general average. The salvors have a lien for their salvage upon the ship, cargo and freight, but upon each of the interests for its proportionate amount only; and the shipowner is not liable, merely because the master has accepted the services of the salvors, to pay the cargo's proportion of the salvage. (See *The Raisby* (1885), 10 P. D. 114.) So far, therefore, the shipowner has not incurred any expenditure for the common benefit. If, however, in order to obtain possession of the cargo, he pays, or renders himself liable to pay, the cargo's proportion of the salvage, he can recover it from the cargo-owner, and enforce this right by exercising a lien on the cargo. (*Briggs v. Merchant Traders' Association* (1849), 13 Q. B. 167.) The question is discussed in Carver, §§ 394, 395; see also Arnould, § 964; and cf. *The Jason* (1908), 162 Fed. R. 56, 62, where Hough, D. J., dissents from the view that there is a distinction between general average and salvage proper.

In practice salvage is treated as

general average, though it cannot always be adjusted on the same basis. For the rule of the Court of Admiralty is that each part of the property saved contributes to the award according to its value at the time when the salvors completed their work, and values adopted by the court are accepted by adjusters for the division of the salvage; whereas in general average, contribution is usually assessed on the value at destination, or possibly in the event of the voyage being broken up on the value at the place where the voyage is abandoned. This value is not necessarily the same as the value at the place where the salvage services terminated. A further difference in the basis of the apportionment arises from the fact that in the division of salvage the actual value of the thing salvaged is adopted, without taking into consideration the value of any portion sacrificed and allowable as general average, whereas for the purposes of general average the amount made good for the sacrifice is added to the delivered value to arrive at the contributory value. (See *infra*, p. 336.) In the same adjustment it may therefore be necessary to apportion salvage and general average separately.

(*c*) How far the owner of the ship,

ship and cargo to the fulfilment of any reasonable contracts he may make for their remuneration (*d*). He has, however, no authority to bind his principals to anything distinctly not reasonable (*e*). Nor has he authority to make contracts for salvage which are one-sided, as giving the ship an undue advantage over the cargo; such, for example, as a contract for rescuing a ship and cargo from a common danger, on the terms that a fixed sum shall be payable in respect of the ship, leaving the salvor to obtain as much as he can from the cargo. "That," said Dr. Lushington, "would open a door to every description of fraud. . . . Of course, salvors would make a bargain with the master much more advantageous to the owners of the ship, when they are sure of obtaining the master's assistance to get a larger salvage from the owners of the cargo" (*f*).

supposing he is at hand and in a position to give orders, has a similar power to that which is undoubtedly invested in the captain when at sea or in a distant port—to what extent the owner can bind the representatives of the cargo by salvage contracts—is a point as to which the law does not seem to be very clear. "The shipowner," says Blackburn, J., in *Kemp v. Halliday*, "is the authorized agent of the owners of the cargo, having the custody of it, and bound to save it if he can." (1861), 34 L. J. Q. B. p. 246.) It would perhaps be carrying the authority of this dictum too far were we to infer from it that contracts for salvage entered into on shore by the shipowner, without the express concurrence of the owners of the cargo, would be binding on the latter. The representatives of the cargo should, at any rate, be consulted when practicable.

(*d*) *I.e.*, if the salvage agreement be an equitable one, a Court of Admiralty will enforce it in an action of salvage against the ship, cargo and freight; and if the shipowner has paid the agreed remuneration, he can recover the cargo's contribution by action against the cargo-owner, or by exercising his lien. (*Anderson v. Ocean S.S. Co.* (1884), 10 App. Cas. 107.) The fact that the shipowner has paid, or is liable to pay, the agreed amount is not, however, conclusive against the cargo-owner. (*Ib.*)

(*e*) *The True Blue* (1843), 2 W. Rob. 179; *Ocean S.S. Co. v. Auder-son* (1883), 13 Q. B. D. at p. 662. See *The Medina* (1887), 2 P. D. 5 (C. A.); *The Silesia* (1877), 5 P. D. 177; *The Mark Lane* (1890), 15 P. D. 135; *The Crusader*, [1907] P. 22, 196 (C. A.).

(*f*) *The Westminster* (1841), 1 W. Rob. 229, 235.

Although, in general, salvors derive their title to remuneration from their being expressly engaged by the master to assist, or from an invitation on his part, such as the hoisting of a signal of distress, yet such express hiring is not always requisite. There may be cases of emergency in which the rendering of unasked assistance will give a title to reward. "It would be dangerous," said Lord Kingsdown, "to hold that, if salvage service be actually rendered to a ship, she cannot be called upon to pay anything unless it can be shown that she either requested or expressly accepted assistance. The urgency of the case may be too great to admit of previous discussion, and if a salvor were required to prove such agreement before he could recover, it is to be feared that there would be much slackness in cases which most require energy and activity" (*g*).

Salvors
acting as
volunteers.

Salvage services may be of many kinds, there being but one absolute requisite, namely, that the ship should be, actually or prospectively, in danger. It is not necessary that the danger should have resulted from the perils of the seas. Thus, if a ship be in danger from being short-handed, owing to deaths or sickness of the crew, this may suffice to give a claim for salvage (*h*). Nor is it necessary that the danger should be imminent. Salvage has frequently been allowed for assistance rendered to a steamer which had lost her propeller, though the weather was fair at the time, simply on the ground that she might be unmanageable in the event of a storm coming on (*i*).

Requisites of
salvage
service.

(*g*) *The H. M. Hayes* (1861), Lush. 375. See also *The Vandyck* (1882), 5 Asp. M. L. C. 17 (C. A.), and cf. *The Emilie Galline*, [1903] P. 106.

(*h*) *The Charlotte Wylic* (1846), 2 W. Rob. 495.

(*i*) *The Ellora* (1862), Lush. 550. In *The Phantom* (1866), L. R. 1 A.

& E. 58, Dr. Lushington said (at p. 60):—"It is not necessary that there should be absolute danger in order to constitute a salvage service; it is sufficient if there is a state of difficulty and reasonable apprehension."

“It will be sufficient,” said Dr. Lushington in another case, “if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered” (*k*). The mere transshipment of a cargo from a stranded ship may be treated as a salvage service, if the cargo were in actual danger at the time. “The degree of danger,” said Dr. Lushington, in a case of this kind, “is immaterial in considering the nature of the service; for if the cargo at all required assistance to remove it into a place of safety, the service then assumes the character of a salvage service” (*l*). A ship which is aground from accident is always considered to be in a state of danger, so that the getting her afloat is a salvage service; for the obvious reason that, though perhaps safe enough at the time, danger must be apprehended should bad weather come on (*m*).

When towage becomes a salvage service.

Ordinary towage, in entering or leaving a port, in the course of a voyage, if the tug is engaged merely to save time, or in accordance with the custom of the port, is of course not a salvage service; but it may be converted into salvage by causes which introduce the element of danger. If, for example, a ship has been disabled by stress of weather, so that, either for want of masts or sails, or from damage to her rudder, or because she is leaky, it is dangerous for her to keep the

(*k*) *The Charlotte* (1848), 3 W. Rob. 68, 71.

(*l*) *The Westminster* (1841), 1 W. Rob. 229, 231.

(*m*) *The Shannon* (1847), 11 Jur. p. 1045. Cf. *Trafalgar S.S. Co. v. British & Foreign Mar. Ins. Co.* (1904), Shipping Gazette, 18th Nov. 1904. In this case, Channell, J., held, where a ship had grounded on soft mud in

the River Plate, that the damage done to her engines in getting her afloat was not general average, because the ship and cargo were in no danger, as any wind which might cause damage would previously have raised the water sufficiently to get her off. See No. 15 of the Rules of Practice of the Association of Average Adjusters.

seas, and if for that reason a steamer is engaged to assist, such service, being extraordinary, is treated as salvage, and is paid for at a higher rate than mere towage(*n*). Again, the coming on of unexpected danger during the performance of a contract for towage may, by rendering the service dangerous to a tug, or by changing its character, give a right to salvage.

Although a tug under contract to tow a ship from one point to another is supposed to take the chance of ordinary changes in the weather which may render the service somewhat longer and more troublesome than usual(*o*); and although she is bound, in case of accident, to render without additional charge such assistance as, while rescuing the ship from danger, involves no additional risk nor material loss of time to the tug, such as backing the ship off a shoal(*p*), or pulling her clear after a collision(*q*); and although, again, the contract to tow is never actually dissolved, so as to justify the tug in standing aloof and making a fresh bargain, so long as there remains a possibility to perform it(*r*); yet the existence of a contract to tow does not debar the tug from recovering an additional payment in the nature of salvage, whenever, in the course of her towing, unforeseen accidents have thrown upon the tug a service, not within the express scope of her contract, and having the effect, on the one hand, of rescuing from danger the vessel in tow, and on the other of either exposing the tug

(*n*) *The Isabella* (1838), 3 Hagg. 427; *The Reward* (1841), 1 W. Rob. 174, 177.

(*o*) *The Galatea* (1858), Swabey, 349.

(*p*) *The Lady Egidia* (1862), Lush. 513.

(*q*) *The Annapolis* (1861), Lush. 355.

(*r*) *The Pericles* (1863), Br. & Lush. 80; *The Albion* (1861), Lush. 282; *The Betsey* (1843), 2 W. Rob. 167, 172; *The Princess Alice* (1849), 3 W. Rob. 138; *The Minnehaha* (1861), Lush. 335.

to hazard, or causing appreciable loss of time or additional labour (*s*).

Basis of
payment for
salvage.

Salvage service of the kind we are here dealing with, namely, such as has the effect of saving the ship and cargo conjointly from a common peril, is rewarded by a payment, varying according to merit; that is to say, not by a fixed proportion on the value of the property saved, but by a rate graduated according to the danger, trouble, skill, and loss of time of the salvor, taken conjointly with the danger from which the property is rescued, and its value. This last, indeed, may be said to be a secondary consideration: it only comes into the account, theoretically at least, as enabling the court to give with a more liberal hand when there is a large fund to draw from (*t*). But, whether the amount be large or small, it is always treated as falling rateably upon the ship, the freight, and the cargo, in proportion to their respective values. The salvors have a right of lien upon all the property saved, on the cargo equally with the ship. The court will discourage, as has been seen, all bargains which have a tendency to disturb the equal incidence of this burden. If, as sometimes happens, the court is required to determine the amount of salvage falling on some portion only of the property saved—the remainder having been arranged by a bargain out of court—the method always adopted for this purpose is, first to fix what is a proper remuneration for the whole service, and then to arrive at the proportion applicable to the defendants by a ratio depending on the values (*u*). Thus, the Court of Admiralty, in this matter,

(*s*) *The Galatea* (1858), Swabey, 349. See also *The Minnehaha*, *supra*, where the principle as stated in the text is clearly laid down; *The Emilie*

Galline, [1903] P. 106.

(*t*) *The Raikes* (1824), 1 Hagg. 246; *The Syrian* (1866), 14 L. T. (N.S.) 833.

(*u*) *The Emma* (1844), 2 W. Rob.

uniformly recognizes and acts upon the principle of general average.

The values taken by the Court of Admiralty for this purpose, it may here be mentioned, are the values existing at the time when the salvors have completed their work, and are prepared to give up their lien on the property to the owners (*x*). Contributing values.

Does the mere attempt to save, when not carried to a successful termination, give a title to salvage? This depends, it seems, on whether the salvors are self-invited volunteers, or have been engaged by the master. In the former case, they go at their own risk, and if they leave their work imperfect, so that no real service to the property results from it, they can claim no reward in case the property be saved by others (*y*). In no case, apparently, unless expressly so stipulated, can salvage be due if there is nothing saved. But "if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labour and service may not prove beneficial to the vessel. The engagement to render assistance to a vessel in distress, and the performance of that engagement so far as necessary, or so far as possible, establish a title to salvage reward" (*z*). Accordingly, where the master of a ship which had lost her anchors in a gale off the Foreland had engaged a steamer to fetch an anchor and cable from shore, and the steamer had gone to Ramsgate for the purpose, and there hired a lugger to bring them out, it was decided that the steamer was entitled Unsuccessful attempts to save.

315, 319; *The Vestu* (1828), 2 Hagg. 189, 193.

(*x*) See *ante*, p. 175, note (*b*).

(*y*) *The India* (1842), 1 W. Rob. 406, 408. If, however, their work, though incomplete, is useful, and

contributes to the eventual safety, they are to be paid for it. (*The Samuel* (1851), 15 Jur. 407; *The Jong Bastian* (1804), 5 C. Rob. 322.)

(*z*) Per Dr. Lushington, *The Undaunted* (1860), Lush. 90.

to salvage for so doing, notwithstanding that, during her absence, the crew of the ship had got ready her spare anchor, and when the steamer returned, the gale having abated, they did not require the chain brought from Ramsgate, and refused to take it (*a*).

Services
ejusdem
generis.

Services which, though not strictly salvage, are of a like nature to it, as being extraordinary in kind, and rendered for the rescuing of a ship and cargo conjointly from a common peril, are, like salvage itself, to be paid for by a general contribution; such, for example, as the labour of boatmen or others hired by the day or tide to carry out anchors or otherwise assist at the floating of a stranded ship with her cargo on board (*b*). [Their remuneration is, however, not salvage, but a general average expenditure in the strict sense of the term.]

II. *Of life salvage.*

Is rewarded
by Act of
Parliament.

§ 39. There is one kind of salvage which is treated like general average, though not for the common safety; and that is salvage of life. Formerly, no reward in the nature of salvage was legally due to those who saved life only, without also saving property; although, when both were saved by the same salvors, a higher reward was always given on account of the saving of life, and the whole of this augmented sum, being nominally for saving the property, was paid by ship and cargo rateably. Thus indirectly, or rather in a disguised manner, the salvage of life was always really treated as general average. Now, by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 544, re-enacting the provisions of the Merchant Shipping Acts, 1854 and 1862, anyone who has rendered

(*a*) *The Undaunted* (1860), Lush. 90. *blom v. Price* (1881), 7 Q. B. D. 129

(*b*) Or pilots, in some cases. (*Aker-* (C. A.).)

assistance wholly or in part in British waters (*c*), in saving life from any British or foreign vessel, or elsewhere in saving life from a British vessel (*d*), is entitled to a reasonable amount of salvage, whether he has also saved property or not (*e*). This salvage is constituted a charge upon the cargo saved, as well as on the ship (*f*); and the owners of cargo saved otherwise than by the life salvors are liable to contribute thereto (*g*). This is, therefore, a species of salvage, created by Act of Parliament. The owner of the cargo is liable for his share, and the salvor's claim on the cargo is protected by a maritime lien: the expense, therefore, is in fact an expense incurred in order to obtain possession of the property (*h*).

III. *Complex salvage operations.*

§ 40. We are in the next place to consider, more precisely, in what cases salvage services, or services of a like nature, are to be treated as general average.

The operations by which a ship and cargo are rescued from a situation of peril may be divided into three classes: First, those which throughout deal with the property as a whole, and, in saving any part, save all at

Classification.

(*c*) See *The Pacific*, [1898] P. 170, and cf. *Jorgensen v. Neptune Steam Fishing Co.* (1902), 39 Sc. L. R. 765.

(*d*) By sect. 545, if the government of a foreign country is willing that salvage shall be awarded by British courts for saving life from ships of that country outside of the jurisdiction, the provisions of the Act relating to life salvage may by Order in Council be made to apply as if the services were rendered in saving life from ships within the jurisdiction.

This provision has been applied to Prussian vessels.

(*e*) *The Fusilier* (1865), Br. & L. 341.

(*f*) See sects. 552, 553. The salvage is borne by the ship, freight and cargo, in the usual proportions. See *The Fusilier* (1865), Br. & L. 341, 347.

(*g*) *The Fusilier*, *supra*.

(*h*) See also, to the like effect, *Cargo ex Schiller* (1876—7), 1 P. D. 470; 2 P. D. 145 (C. A.); *Cargo ex Sarpedon* (1877), 3 P. D. 28.

once; as, for example, when a steamer tows a loaded ship off a sandbank. Secondly, those which consist in the rescuing of portions of the property, disconnectedly, and so that the saving of one portion has no reference to, and does not assist in, the saving of another portion; such as the recovery of goods or ship's materials strewn along a beach, or floating about at sea, after the ship has broken up. Thirdly, those which have for their object the saving of the whole property, or so much of it as can be saved, not all at once, but by a series of distinct operations, each of which has or may have the twofold effect of immediately rescuing from danger one portion of the property, and of facilitating the eventual recovery of the remainder; as when, a ship being ashore, and her floating uncertain, some of the cargo is first taken out, and it then becomes possible to tow her off by a steamer when she has been lightened. These last may be called complex salvage operations.

There is no difficulty about the first or second class of expenditures. The first always, the second never, form the subject of general average. The third kind require a somewhat fuller examination.

Distinction
between one
entire opera-
tion and
several.

What we have first to consider in each of these cases is, whether the particular case before us for adjustment is more properly to be treated as one entire operation, or as a series of partially distinct operations, which, though conjointly tending to one common purpose, yet likewise have each a distinct purpose of its own, and a purpose which for one reason or another deserves or may deserve more attention than that purpose which is common to them all. Each of these cases, it may be said, is one in which there are two distinct stages, each involving an extraordinary expenditure. The whole ship and cargo being in a position of more or less danger, we begin by

placing a portion—generally, from the necessity of the case, a portion of the cargo—into a position of absolute safety, as by landing it, in doing which we, at the same time, improve the condition of the ship and remaining goods, not so far as to bring them into safety, but so as to facilitate their safety in the future; that is the first operation or part of the operation. The second is the bringing into safety of the remainder, whether the ship alone or the ship and the remainder of the cargo not saved the first time.

Theoretically, before we can determine that the cost of thus saving the cargo at the top should be contributed to by the cargo at the bottom and the ship, we ought to be able to say that that cost is in some proper sense a sacrificing or giving of a part for the sake of the whole. The cost of saving each particular package or portion of the cargo being *primâ facie* a charge on that specific portion, it can only be properly called a sacrifice for the sake of something else than itself, in case the act, looked at by itself, did not confer on the goods directly saved a special benefit exceeding its cost. If it were—as in many cases it is the case—that the operation of saving the cargo, taken by itself, conferred on the cargo saved an advantage far exceeding its cost, it is not easy to see on what ground it could claim contribution from the part not saved, on the mere ground of a smaller incidental benefit derived by the latter, and yet refuse to make a corresponding contribution towards the cost of subsequently saving the latter, on the plea that, being itself already in safety, it had ceased to be interested in the fate of the remainder. This is not so in fact; the saving of the remainder brings that remainder into existence as a contributor towards the expense of saving that which was saved first.

Theoretically, then, on the principle that he who claims equity must render equity, it may confidently be laid down as just that in all these cases of complex salvage operations, either the whole cost of saving the property from first to last should be treated as general average, or the whole from first to last should be treated as specific; that is to say, provided the whole cost from first to last is the result of one and the same accident. Changes may occur, especially when a ship is ashore or sunk, either from the effect of subsequent bad weather acting on the ship in her exposed situation, or merely from the actual danger or difficulty of her position becoming better known, so that the method of treatment has to be changed; but, failing any such changes, it cannot be right to treat the first step in the system of operations as general average and the later stages as specific. This, indeed, is in the practice of adjusters sometimes done; but this is only a part of a mistaken tendency to treat the cost of an extraordinary discharge of cargo as invariably the subject of general average without regard to its motive.

This rule—either general average all through, or specific all through—is practically simpler and freer from objections than any other. Those who act on the doctrine that the cost of discharging should be general average because it benefits the ship and all the cargo, but that when the cargo is out the cargo should not contribute to the cost of heaving off the empty ship, ought in consistency to hold that so soon as any definite portion of the cargo, *e.g.*, the portion in the between-decks, has been taken out, it should for the same reason cease to contribute towards the cost of taking out anything then left behind: nay, that so soon as any one package is taken out, it should contribute no longer: a doctrine

which would necessitate as many distinct apportionments of general average as there were packages in the ship. This being impracticable, adjusters [at the time when Mr. Lowndes wrote] often made rough compromises by dividing the cargo into broad classes, according to the several holds the packages are stowed in; an arrangement which has the objection of being purely arbitrary, as well as indefensible in principle (*hh*).

§ 41. We are in the next place to consider the more difficult question, by what tests are we to determine whether to treat the entire salvage operation as one whole, or as a complex of which each portion is to be dealt with separately? As to this, it will be convenient to begin by setting forth the decisions which bear upon the subject.

These are five—*Kemp v. Halliday*, *Job v. Langton*, *Moran v. Jones*, *Walthev v. Mavrojani*, and *Royal Mail Steam Packet Co. v. English Bank of Rio*.

When a ship with her cargo on board has been sunk, if the cargo can be more easily and cheaply saved by itself than conjointly with the ship, the cargo cannot be required to pay, as its share of contribution towards a conjoint salvage, a larger sum than would have been the cost of saving it separately.

The authority for this proposition is *Kemp v. Halliday*. There, a ship was sunk with her cargo on board, and one of the questions in the case was, whether the expense of raising her with her cargo was a general average to which the cargo must contribute. "I do not mean to say," said Blackburn, J., in giving his judgment, "that in every case where a ship with a cargo is submerged, and the two are in fact raised together by one operation, the expenditure incurred must necessarily

*Kemp v.
Halliday.*

(*hh*) See the editors' remarks, *infra*, p. 203.

be for the common preservation of both. I think it is in every case a question of fact whether it was so; and, if the cargo could be easily and cheaply taken out of the ship, and saved by itself, it would not be proper to charge it with any portion of the joint operation: which, in that case, would not be incurred for the preservation of the cargo" (*i*).

The case went up to the Exchequer Chamber, and there the same principle was adopted. Erle, C.J., in enumerating the inferences of fact drawn by the court, and which, taken together, led to the conclusion that in that particular case the cost of raising the sunk ship with her cargo in her was properly a general average charge, mentions as one of them that "The most convenient mode of saving either ship or cargo or both was by raising the ship together with her cargo" (*k*).

There seems to be no reason why this principle should not be as applicable to a ship which is stranded as to one which is sunk.

The barque *Snowdon*, on a voyage from Liverpool to St. John's, Newfoundland, ran ashore on Malahide Bay, on the coast of Ireland. The vessel at low water was high and dry; and it became necessary to discharge the whole of the cargo and the ballast before she was got off. After the cargo was discharged and placed in store in Dublin, the vessel was got off at considerable cost, with the aid of a steam-tug, and by cutting a channel for her. She was then towed to Liverpool and

(*i*) *Kemp v. Halliday* (1865), 6 B. & S. 723; 34 L. J. (N. S.) Q. B. 233, see p. 243. See also the remarks of Wills, J., in *Royal Mail Steam Packet Co. v. English Bank of Rio* (1887), 19 Q. B. D. 362, at p. 375, with reference to the duty of the

master to take special measures for the purpose of saving specie, which owing to its small bulk can be placed in safety with exceptional facility.

(*k*) *Kemp v. Halliday* (1866), L. R. 1 Q. B. 520; 35 L. J. (Q. B.) 156 (Ex. Ch.).

repaired. The cargo was, in order to save its market, sent on by another vessel; but, by agreement, the question before the court was to be determined as if *The Snowden*, after being repaired, had carried on her cargo. The question was, whether the expenses incurred in getting off the ship and taking her to Liverpool to repair, after the entire cargo was discharged, were chargeable to general average, or to particular average on the ship alone.

Blackburn, arguing for the defendants, that is to say, contending that the expense in question should be general average, said: "The argument on the other side, if logically followed out to its result, would prove that the taking out the first lighter-load of the goods was general average, but the taking out of the second, when the first was safe, was not. But the whole is one transaction. What difference does it make that the ship and goods were not got off simultaneously, when the result of the whole operation was that the whole adventure was completed and saved?" *Blackburn, arguendo.*

Lord Campbell, delivering the judgment of the Court of Queen's Bench, pronounced that the expenses incurred in getting off the ship and taking her to Liverpool for repair, after the entire cargo was discharged and in safety, were not chargeable to general average, but to the ship alone. *Lord Campbell.*

"There is no decision on the specific point," said the learned judge, "and there is no mercantile usage to guide us. We must, therefore, resort to the general principles on which this head of insurance law rests." [The learned judge then referred to *Birkley v. Presgrave* (1), and pointed out, first, that the expenses in question were not sacrifices, since the stranding was fortuitous; and he continued:] "The expenses, to constitute general average, must

(1) (1801), 1 East, 228.

therefore be brought within the second category, 'extraordinary expenses incurred for the joint benefit of ship and cargo.' Although the stranding was fortuitous, all expenses incurred from the misadventure till all the cargo had been discharged confessedly constituted general average. But how could it be said that the subsequent expenses in getting off the ship and taking her to Liverpool for repair were of the same character? The employment of the steam-tug, and the cutting of the channel by which the ship was rescued, cannot, as was contended for, be part of the same operation as the unloading of the cargo; for the case expressly finds that 'the steam-tug did no work at the ship until after the cargo was landed, and the coals and ballast taken out of her.' We, therefore, do not see how these expenses are to be distinguished from the expenses of repairing the ship when she had been brought to Liverpool, which, it is admitted, must fall exclusively on the owner of the ship or the underwriter on the ship, as particular average. If the owner of the ship was to earn the stipulated freight by carrying the cargo to Newfoundland, it was his duty to repair her and to carry her to a place where she might be repaired. . . . We do not say that there may not be a case where, after a fortuitous stranding of the ship and the cargo has been unloaded, expense voluntarily incurred by the owner of the ship to get her off, and to enable her to complete the voyage, whereby the cargo, which otherwise must have perished, is carried to its destination, may be general average; as the stranding of a ship, with a perishable cargo, on a desert island, in a distant region of the globe. But in the present case, the owner of the ship, after the cargo was discharged, appears to have done nothing except in the discharge of his ordinary duty as owner, and for the exclusive benefit of the ship" (*m*).

Moran v. Jones (*n*) was tried in the following year in the same court. The ship *Tribune*, shortly after sailing from Liverpool for Callao, ran aground on East Hoyle Bank. She was in ballast, under charter to fetch a cargo from the Chinchas; but she had on board, by the charterer's permission, a small quantity of goods belonging to other parties (*o*). Two days after she ran ashore, the

(*m*) *Job v. Langton* (1856), 6 E. & B. 779, at p. 790.

(*n*) (1857), 7 E. & B. 523.

(*o*) Mr. Lowndes said that the

weather being more moderate, assistance was procured from Liverpool, and men were employed saving from alongside the wreck of the ship's foremast which had been cut away, the materials of the ship, and the goods, all of which were sent in lighters to Liverpool. Afterwards, a stream anchor was carried out, the ship was scuttled, about 300 tons of ballast were thrown overboard, and then the ship, being kept free by pumping, floated. She was then towed by two steamers back to Liverpool, and there repaired. The only question raised was, whether the sum of 643*l.*, which had been expended, after the cargo was taken out, for the purpose of floating the ship and bringing her to Liverpool for repair, should be likewise treated as general average. If not, the further question was raised whether it should be borne by the ship and freight conjointly, or by the ship alone.

For the plaintiff it was argued by Broun that, *Broun, arguendo.* whereas in *Job v. Langton* the taking out of the cargo, and the subsequent saving of the ship, were two distinct operations, it was not so here, but the whole was one continuous operation, which commenced before the goods were landed, and the expenses in respect of which could not, therefore, be separated into distinct portions. In such a case the goods must contribute to the general average upon all the expenses of the preservation, as was decided in the Supreme Court of Philadelphia in *Bevan v. Bank of the United States* (*p*). No doubt it would be otherwise where the goods were taken out merely for the purpose of saving them, as was the case

goods belonged to the shipowner. There was a statement to this effect in the average adjustment, which was, according to the reports, agreed to be accurate in its facts; but the special case says distinctly

that the vessel sailed with a small quantity of goods shipped by the shipowner "on freight from other parties."

(*p*) (1839), 4 Wharton, 301.

in *Bedford Commercial Ins. Co. v. Parker* (q), decided in the Supreme Court of Massachusetts; that state of things does not appear on the facts of this case; on the contrary, the object of detaching the goods was to save the whole. [Lord Campbell, C. J.: Had the goods remained on board they would, of course, have been liable to contribute to the general average; you will say that these goods virtually were on board.] It might be so put. The case shows a series of connected steps taken to carry out the adventure.

Blackburn,
arguendo.

For the defendant it was argued by Blackburn, that the master in warehousing the goods must be taken to have acted for the benefit of the owner of the goods; and that, after the warehousing, the owner of the goods ceased to have an interest in the preservation of the ship. What happened after the goods were saved, though necessary to enable the ship to earn freight, was not more so than the repairs of the ship. The mode of apportioning these charges ought not to be affected by the circumstance that the ship and freight belonged to the same person.

Lord
Campbell.
Freight in
any case
liable.

Lord Campbell:

"In this case we never doubted that the defendant, as underwriter on the *freight*, was liable to a contribution to general average in respect of the sum of 643*l.*, the expenses incurred in order to get the ship off from the bank on which she was stranded, whether the *goods* were or were not liable to contribute to this portion of the loss. It is admitted that the ship could not have been got off and completed her voyage unless these various expenses had been incurred. Therefore, without these expenses, there would have been a total loss of the freight, amounting to the sum of 6,750*l.* Even if the goods were not liable to contribute, on the ground that they were not exposed to any peril when these expenses were incurred, still the freight, which was then exposed to peril and has been saved,

ought to contribute as if there had never been any goods on board, and the ship had sailed from Liverpool to Callao in ballast. Usually, wherever there is a general average, ship, freight, and goods all contribute to it; but if there be no goods on board, and by a voluntary sacrifice ship and freight are saved from a common peril, the freight ought rateably to contribute to the loss; and, where there are separate insurances on ship and freight, the calculation must be made as to the amount of the contribution by each, although the whole of the freight which was in peril is to be received by the owner of the ship, and without insurance the whole of the loss would fall upon him.

“ But the sum for which this defendant is liable will depend, to a certain degree, upon the question whether, under the circumstances stated, these goods are to contribute in respect of the 643*l.*; and upon this question likewise we are bound to give our opinion. The goods had been taken from the ship, and put on board a lighter before these expenses were incurred; and if this had been a separate operation by which they were intended to be saved for the benefit of the owner of the goods, we should have thought (as in *Job v. Langton* (r)) that the goods were not liable to contribute to the expenses subsequently incurred. Looking however, to the facts stated in this special case, it seems to us that the act of putting the goods in the lighter was only part of one continuous operation, viz., getting the ship off the bank on which she was stranded, and sending her to Liverpool, where she might be repaired with a view to prosecute the original adventure. When she got to Liverpool, the operation of saving her from shipwreck was completed, and the whole expense of the repairs fell upon the owner as owner, and must be borne by him in that capacity, or by the underwriters of the ship; but the expense of this continuous operation, for the common benefit of ship, goods, and freight, are the subject of a general average. In *Job v. Langton* (s), we considered that the goods had been saved by a distinct and completed operation, and that afterwards a new operation began which could not be properly distinguished from the repairs done to the ship to enable her to pursue the voyage. ‘The steam-tug did no work at the ship,’ and does not appear to have been engaged ‘until after the cargo was landed, and the coals and ballast taken out of her.’ . . . But in the case on which we have now to adjudicate, the goods were

Whether
cargo also
liable.

(r) (1856), 6 E. & B. 779.

(s) Ibid.

put into a lighter by the master of the ship, along with materials of the ship saved from the wreck, and they remained in the custody and under the control of the master till the ship was repaired, when they were reloaded in the ship and carried forward, without any interference by the owner of the goods, to their destined port. Unless it had been intended that an operation should be undertaken and completed, by which both ship and goods should be rescued from the peril to which they were exposed, nothing might have been done, and the goods might have perished. Because the goods happened to be saved in the earliest part of the operation, this can be no sufficient reason for saying that they ought not to contribute to all the expenses of the operation which contemplated the benefit of all the interests imperilled by the stranding. . . . The result is that, in our opinion, the . . . apportionment . . . is right, on the principle of charging the 64*l.* to general average" (t).

Walthew v.
Mavrojani.

The third of these cases, *Walthew v. Mavrojani* (u), was that of the ship *Southern Belle*, which, while lying at Calcutta, laden with a cargo of linseed for London, was driven from her moorings by a cyclone, and left fast aground on a mud-bank. A survey was held on her, and it was recommended that the cargo and ballast should be discharged, and the ship dismantled, it being in the surveyor's opinion impossible to remove the ship from the strand. By the 19th October the whole of the cargo was safely warehoused in Calcutta. On that day a surveyor examined the ship, and advised that she would not float without extraordinary means being employed to get her off the strand. Tenders having been invited, a firm at Calcutta contracted with the plaintiff's agents to float the ship; but on the 24th of November, their efforts having proved unavailing, they declared their inability to perform the contract, and abandoned the attempt. The plaintiff's agents then made a fresh contract with Messrs. Burns & Co. for 2,300*l.* to float the

(t) *Moran v. Jones* (1857), 7 E. & B. 523.

(u) (1870), L. R. 5 Exch. 116.

ship; and they, by constructing an embankment round the vessel, so as to form a dock, which they afterwards filled with water, succeeded, on the 31st of December, in floating her.

Here the question was raised, whether this 2,300*l.* was the subject of general average. In the Court of Exchequer it was held not to be so, but this was appealed against. For the plaintiffs it was argued that the present case was more similar in its facts to *Moran v. Jones (x)* than to *Job v. Langton (y)*; and that the true principle is that, so long as the voyage is not abandoned, and the goods remain in the care and custody of the shipowners for the purpose of the voyage, although they may not be actually on board, the whole is one common enterprise and adventure, in which the owner of the ship and the owner of the goods are alike interested; and consequently that whatever is done by the shipowner for the purpose of averting a risk which threatens that adventure, is done for the common benefit. To this, however, Bovill, C. J., at once objected, "That proposition would include equally repairs which are necessary for enabling the ship to complete the voyage."

The decision of the court was unanimous that the *Bovill, C. J.* expense should not be general average. Bovill, C. J., said:

"I am of opinion that the judgment of the court below must be affirmed. There is no doubt that the expense of all repairs to the vessel rendered necessary by the ordinary perils of navigation, and which are required to enable it to prosecute the voyage and complete the adventure, must be borne by the owner. He has undertaken, subject to the usual exceptions, to carry the cargo to its destination and there deliver it, and therefore the costs of repairs are expenses incurred for the benefit of the ship alone, and cannot be treated as the subject of general average. If, however, loss or

(*x*) (1857), 7 E. & B. 523; 26 L. J. (y) (1856), 6 E. & B. 779; 26 L. J.
(Q. B.) 187. (Q. B.) 97.

expense is occasioned by reason of some extraordinary course taken, or risk incurred, for the benefit of all concerned, then those who, by reason of their being exposed to a common danger, are interested in that course being taken or that risk incurred, must contribute their share. Upon the general principle there is no dispute. But from time to time endeavours have been made to engraft exceptions upon this rule. In *Hallett v. Wigram* (z), an attempt was made to throw the expenses of repairs of the ship upon the owners of cargo, and upon exactly the same grounds on which it has been contended in the present case that the expenses in question should be treated as general average. In order to test the principle, the point was there raised by the defendants upon the pleadings, in an action in which the owners of the cargo sued the shipowners for the value of a portion of the cargo, sold to raise money for repairs which were rendered necessary by tempestuous weather." [After referring to the pleadings, his Lordship continued:] "Therefore, by the most positive and distinct allegations, the principle was there sought to be established that if the repairs are necessary for enabling the ship to carry the cargo, and would not have been necessary but for that purpose, and are in that sense done for the common benefit of both ship and cargo, the cargo must contribute. The court, however, decided against this principle. . . . In that case, therefore, the Court of Common Pleas deliberately, and upon the strongest possible allegations of fact, declined to adopt the principle now contended for." The learned judge then pointed out that in *Job v. Langton* (a) the facts, and the point at issue, were very much the same as in the present case. It had been argued that *Moran v. Jones* (b) was inconsistent with it, and, as the later decision, was to be preferred. "Now *Moran v. Jones*," he continued, "was a peculiar case. The facts were somewhat similar to those of the present case, though not so similar as those in *Job v. Langton* (c); but, in construing the decision, we must take not only the facts stated, but also the inference which the court drew from them. The court did not affect to interfere with the principle laid down in *Job v. Langton* (c), which was a considered judgment pronounced after an elaborate argument; on the contrary, they expressly adhered to that decision, and the whole case turned on a difference in the

(z) (1850), 9 C. B. 580.

(b) (1857), 7 E. & B. 523; 26 L. J.

(a) (1856), 6 E. & B. 779; 26 L. J. (Q. B.) 187.

(Q. B.) 97.

(c) (1856), 6 E. & B. 779; 26 L. J. (Q. B.) 97..

facts and on the inference which the court drew from those facts.”

. . . After referring to the language of *Moran v. Jones* (*d*), above set forth, the learned judge concluded as follows: “This case, therefore, does not interfere with the decision in *Job v. Langton* (*e*). But if Mr. Aspinall were right, and there were an inconsistency, I should be prepared to abide by the latter case. . . . The English courts have held strictly that unless there be a common risk, and a voluntary sacrifice, or an extraordinary expenditure incurred for the joint benefit of ship and cargo, a claim to general average is not established. Now to apply this principle to the present case. It is here stated that, the ship having been driven ashore in the cyclone of the 5th of October, the cargo was landed and was safe on shore by the 19th, but that the ship was then still on the bank, exposed to grave peril. The goods being then safe, what difference would it have made to their owners if the ship had been overwhelmed by the sea and sunk? After this an effort was made to get the ship off, which proved abortive; then another and successful effort was made, and it is in respect of the expense incurred in this last attempt that the plaintiffs make this claim of general average. But when those expenses were incurred the goods had already ceased to be connected with the ship, except in so far as that if the ship were got off she would be able to carry on the goods to England; and it is not shown that any advantage resulted to the owners of the goods from their being carried on in that ship rather than in any other; and if general average were claimed on that footing it would have to be assessed on altogether a different scale from that of the value of the goods. No claim of that kind is, however, made. In short, whereas to ground a claim for general average there must be a danger, actual or impending, common to both ship and cargo, here the cargo was safe and the ship only in peril; it was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made, or extraordinary expense incurred, to save both ship and cargo, or for the common benefit of both.

“The claim has been put on the ground that the adventure was not complete, and that until it was terminated there was a common interest that it should be carried out. But that argument is in direct contradiction to the principle laid down with respect to re-

(*d*) (1857), 7 E. & B. 523; 26 L. J. (Q. B.) 187.

(*e*) (1856), 6 E. & B. 779; 26 L. J. (Q. B.) 97.

pairs, which are equally necessary to enable the ship to complete the adventure, but which are not matters for general average; and, independently of authority, it also fails to show any common peril, or any sacrifice made to secure a common benefit. That the argument does so fail, and that general average does not depend on whether the adventure can or cannot be carried out, is abundantly shown by the cases to which I have already referred. The judgment below must therefore be affirmed" (e).

The other judges, Mellor, Montague Smith, Lush, Hannen, and Brett, J.J., concurred. M. Smith, J., said :

"I only wish to add, that I think there may be cases where, though the goods are landed and so far in safety, yet the adventure of the owner of the goods may still be in peril, as in the case of perishable goods landed on a desert island in a distant and unfrequented part of the world. But here, not only were the goods landed, but I draw the inference that it was indifferent to the owner whether they went forward to England in *The Southern Belle*, or in any other ship."

Hannen, J., said :

"Ordinarily, expenses incurred subsequently to the removal of the goods can only be incurred to save the ship, and are not for the benefit of the cargo" (f).

*Royal Mail
Steam Packet
Co. v. English
Bank of Rio.*

[*The Tugus*, on a voyage from Rio de Janeiro to Southampton, having on board specie of the value of 125,000*l.*, partly belonging to the defendants, and a general cargo, ran aground on an island near Bahia and lay in a dangerous position. The weather being bad, the master landed the specie on the next day on the island, and afterwards jettisoned some of the cargo, and with the assistance of several tugs got the ship off the ground. After the specie was landed, it was taken to

(e) *Walthev v. Mavrojan* (1870), L. R. 5 Exch. 116, at p. 119.

(f) *S. C.*, at p. 125.

Bahia and forwarded in another vessel; but the parties agreed that for the purpose of ascertaining whether any general average contribution was due from the defendants it should be treated as having been carried by the plaintiffs in *The Tagus* to Southampton.

The plaintiffs claimed a contribution from the defendants in respect both of the jettison, the expense of floating the ship, and the cost of landing the specie and conveying it to Bahia; and a special case having been stated, their counsel argued before a Divisional Court that the specie was landed on the island, and sent on to Bahia, as part of a continuous salvage operation, undertaken for the common preservation of ship, cargo and freight, of which the jettison and the employment of the tugs formed another part. The court held, however, that the landing of the specie was not part of a general average act, and that the specie was not bound to contribute to the expense of getting the ship off the shore. Mr. Justice Wills, after reviewing the authorities, said:

"Cases, no doubt, may occur in which it may be difficult to say whether the purpose for which goods are removed is that of lightening the ship or of saving the goods, and there will no doubt from time to time be instances in which it is impossible to separate the one purpose from the other. 'The mere fact that the cargo is unladen, although it is done in part for the purpose of saving the goods, yet if it is also done for the purpose of lightening the vessel and as a means of causing her to float, and of saving her from the common peril will not necessarily divest the transaction of its character as an act performed for the joint benefit of ship and cargo': *McAndrews v. Thatcher* (g) in the Supreme Court of the United States. It is impossible with reference to such a matter to lay down any rigid or inflexible rule. The question will be one of circumstance and degree, and each case must depend upon its own facts. . . . The whole of the specie in this case weighed, we are told, about a ton and a half. *The Tagus* is a vessel of some 3,000 tons burthen.

The ease to the vessel could be nothing at all. The combined value and smallness of total weight would be certain in any case to save the specie from jettison. Its value and the facility with which it could be got ashore would be certain, in any case where it was possible to land it, to save it from being left on board, and I cannot doubt that its removal was carried out, not in any sense or degree as a means of securing the common safety of ship and cargo, but simply for the purpose of saving the specie itself. I think, therefore, that when the general average loss was incurred, in whatever sense, restricted or enlarged, that phrase can be properly used, it had ceased to be at risk, that upon no reasonable view of the facts can its removal be considered as a part of the means taken for saving any common adventure. I am consequently of opinion that it is not liable, using the words of the special case, 'to contribute to the jettison or to any of the expenses of getting the ship off the ground incurred after it was landed' (h).]

Practical result of above decisions.

§ 42. Having thus set forth the decisions bearing on our question, we return now to the question itself,—which may be stated thus,—when a ship with her cargo has been stranded or sunk, and is to be brought into safety, not all at once, but by a series of connected operations, by what tests or in what manner shall it be determined whether the entire cost of those operations from first to last shall be borne by a general contribution on the part of the whole property, as if it were a single operation, and not be borne specifically by the property saved by each specific portion or stage in the operation.

On this subject Mr. Carver, in his book on Carriage by Sea, has put forward a theory which deserves careful consideration. His words are as follows:—

Mr. Carver's theory.

“§ 398. If the ship and cargo can be saved by a connected set of operations, though in separate parts, it seems that the expense of the whole operations should be treated as a general average expenditure, unless that would impose a greater burden on the cargo than

the cost of saving it alone (*i*). Thus, if the ship could be floated off by putting the cargo into lighters for a time, it seems clear that the expenses of discharging into the lighters ought not to fall wholly on the cargo, though that may have been essential for its own safety. It must be presumed in such a case that the master meant to incur them for the benefit of the whole, ship and cargo together.

"So also in other cases where the cost of the first discharge is so great, in proportion to the expenses of afterwards rescuing the ship, that it is more favourable in the interest of the cargo that the whole expenses should be treated as general average expenses.

"For if, in such cases, the operation of discharging were treated as a separate burden on the cargo discharged, the ship and the cargo remaining in her would have the benefit of that as well as of the subsequent operations, and yet would bear a smaller share of the whole expenditure. The principles of general average require that, as far as possible, the person at whose expense a sacrifice has been made should be put in the same position as if the property of another had been selected for the sacrifice, and that the willingness to incur the disproportionately heavy first expenses, which led to a benefit for the whole of the interests concerned, should not be discouraged.

"But if the ship was in such a position that the prudent course in the interest of the cargo, having regard to its own safety, and to probable cost, was to remove it and bring it into a place of safety, the expense of doing this should fall upon the cargo-owners alone (*k*). And the fact that the ship may thereby have been helped to come off should not make a difference. For the expenditure on behalf of the cargo, though it may have incidentally benefited the ship, was not a sacrifice; on the hypothesis, it was the best thing that could be done for the cargo. The whole expenditure was necessary in its own interest, and was incurred for itself, not for the rest.

"With regard, then, to the first of the above questions, it may perhaps be said, generally, that if at the time the cargo was dis-

(*i*) *Kemp v. Halliday* (1865), 34 L. J. (Q. B.) 233.

(*k*) "There is an obvious unfairness in giving to the cargo at the top and near to the hatches, over and above the natural advantage of its position in such cases, of being the

first to be saved and at the least expense, the further privilege of being able to require the cargo underneath to contribute towards the expense of saving it, while itself does not contribute towards the expense of saving the cargo underneath."

charged it was probable that the cost of the discharge would bear so large a proportion to that of getting the ship off afterwards, that, taking risks into account, it was in the interest of the cargo to carry on the whole operation as one, then the presumption is that the discharge was meant to be a general average act; but that otherwise it should be regarded as done for the benefit of the cargo, and the expenses should be charged to that" (l).

Mr. Carver concludes as follows :

The two operations should be treated distinctly, or else as one whole.

"The two operations, then, of taking out the cargo and getting the ship off, may be regarded as separate transactions for the benefit of the parts, or as constituting one whole transaction for the benefit of the whole. The first operation is only a general average act when both have that character; and the same is true of the second. One or other view should be adopted throughout; the ship should not contribute to the cargo, unless the cargo contributes to the ship, and *vice versâ*" (m).

Benecke.

Benecke's great authority is substantially on the same side. He says (p. 216), "Nor do the expenses of unloading a stranded vessel belong to general average if before the unloading it was uncertain whether by that measure the vessel may be set afloat or not, and it be afterwards found that other means must be employed to bring the empty vessel off. For it would be evident that the unloading was necessary for saving the *goods*, independent of the benefit which the vessel derived from it."

Surely the real question must in each case be, Has there been a sacrifice? in other words, was the cargo taken out for its own sake, or for the sake of something else? In these cases, the degree of danger to which the property stranded or sunk is subject has a very wide range. The ship may be lying on a shelving edge of rock, exposed to Atlantic gales, in danger momentarily of slipping into deep water and being totally lost: her

(l) Carver, Carriage by Sea, § 398

(m) *Ib.*, § 400.

cargo may be rapidly becoming worthless: anything that can be snatched from destruction will be a godsend. Or she may be stranded in the Thames, on a mud-bank, tight and for the time being safe. Taking out the cargo in the latter case is not saving it, but subjecting it to an expense for the sake of the ship. In the former case, whatever is taken out by salvors, though it were at a salvage of 25 or 50 per cent., is far better off than what is left behind. It seems reasonable that, whilst the ship shall contribute to the Thames discharge, yet in the former case, whether the ship is eventually floated or not, the cargo first saved shall bear its own salvage, and whatever is saved afterwards shall bear its own expenses. And intermediate cases shall be dealt with according as they more resemble the first or the second of these two: or, in other words, according as the facts raise a reasonable presumption that the principal motive for taking out the cargo was to save the cargo itself, or to save something else. This view, as Mr. Carver says, with reference to an earlier edition of this book, does not materially differ from his own.

It must be borne in mind, however, that this is a question not yet decided by the courts.

[It will be noticed that the doctrine strongly advocated both by Mr. Lowndes and Mr. Carver, that in all these cases of complex salvage operations either the whole cost of saving the property should be treated as general average, or there should be no contribution, finds no support in the decisions which have just been discussed. The judgment in *Job v. Langton* (n) is indeed an express authority to the contrary, although it was unnecessary to decide the point. The theory that on grounds of equity all the operations or none should be

Editors' view
as to complex
salvage
operations.

(n) *Ante*, p. 188.

treated as general average is, no doubt, an attractive one. Nevertheless, the editors think that opinions may differ as to the equity of compelling the property already saved to contribute to the cost of operations not necessary for its preservation, merely because the ship and the rest of the cargo have been made to contribute to the cost of a previous operation essential for their own preservation.

With regard to the initial operations which result in part of the property at risk being brought to a place of safety, it may well be that if the sole, or perhaps the predominating, object is the saving of that particular portion of the property, these operations ought not to be charged as general average, though they have incidentally benefited the other interests(*o*); but the editors submit that there is no justification in principle for the tests which Mr. Lowndes and Mr. Carver suggest for determining whether an operation which furthers the work of salving the whole of the property is or is not general average. Surely there is a presumption that such an operation was undertaken for the common benefit, which is not rebutted by showing that the operation has conferred on the cargo an advantage far exceeding its cost(*p*), or that it was the best thing that could be done for the cargo(*q*).

With regard to the question when the removal of the cargo from the ship and the measures taken subsequently to bring the ship into safety can be treated as part of one entire operation, it may be pointed out that in order to found a claim for general average, an operation must be undertaken for the preservation of the ship

(*o*) See the judgment of Wills, J., D. 362.
 in *Royal Mail Steam Packet Co. v.* (*p*) *Ante*, p. 185.
English Bank of Rio (1887), 19 Q. B. (*q*) Carver, § 398, *ante*, p. 201.

and cargo, not for the purpose of enabling the ship to prosecute the voyage (*r*); and it can only be under exceptional circumstances that, after the cargo has been removed from the ship, any step taken for the purpose of saving the ship can be deemed necessary for the safety of the cargo. In holding that the landing of the goods and the salving of the ship were parts of a continuous operation, the court in *Moran v. Jones* were, to some extent at least, influenced by the fact that the whole series of operations was necessary to enable the adventure to be successfully prosecuted, a circumstance which, as has just been pointed out, does not, according to English law, make the operation as a whole general average. It is very questionable whether, on the facts of the case, the judgment in *Moran v. Jones* can be supported (*s*).

Under modern conditions, however, salvage opera-

(*r*) *Sveudsen v. Wallace* (1884), 13 Q. B. D. 69. See the judgments of Brett, M. R., and Bowen, L. J., *infra*, pp. 234, 238.

(*s*) The remarks of Bovill, C. J., in *Walthev v. Mavrojani* on *Moran v. Jones* have already been set out; and the later comments on the case may now be noticed.

"I take it to be settled now," said Wills, J., in *Royal Mail Steam Packet Co. v. English Bank of Rio* (1887), 19 Q. B. D. at p. 370, "that the circumstances which impose a liability in the nature of general average must be such as to imperil the *safety* of ship and cargo and not merely such as to impede the successful prosecution of the particular voyage. I take it also to be settled that if the cargo as a whole be landed and in safety, the expenses of getting the ship afloat incurred thereafter are not general average: *Job v. Langton*,

a case with which *Moran v. Jones* has been supposed to conflict, but which does not seem to me, so far as principles are concerned, to be open to that observation. It is the decisions, if anything, which are at variance, not the principles upon which they are based." And Grantham, J., said, *ibid.*, at p. 377: "As that case (*i.e.*, *Moran v. Jones*) has not been since followed, even if it has not been overruled, we could not act upon that decision unless the facts were absolutely identical."

In *Sveudsen v. Wallace* (1884), 13 Q. B. D. at p. 80, Brett, M. R., said that, in his opinion, *Moran v. Jones* could not be supported; Bowen, L. J., said (p. 93): "The inferences of fact drawn by the Court of Queen's Bench may or may not have been correct, but the decision has reference only to the special facts of the case."

tions are often conducted in a manner which differentiates them from the operations which were usually undertaken when the cases under discussion were decided, or even when Mr. Lowndes wrote. Distant parts of the earth are connected by submarine cables and wireless telegraphy, steamships have largely taken the place of sailing vessels, and they are in increasing numbers fitted with a wireless telegraphic installation, which enables them even in uninhabited places to summon expert assistance.

Moreover, the salvage of wrecked vessels has now become a fine art, and it would be difficult to apply the tests formerly adopted to a modern case of salvage. Let us take a common case, viz., that of a steamer running ashore. The casualty is quickly reported, and steamers, specially fitted with salvage appliances, are probably sent to her assistance with all despatch. A careful examination of the vessel's bottom, and of the nature of the ground upon which she is stranded, is made by divers, and expert advice is taken as to the desirability of proceeding with the operations. The salvage, except in extreme cases, is generally considered worthy of attempt, and probably the first step that is taken is to discharge some cargo into craft for the purpose both of enabling the necessary salvage machinery to be fitted and to lessen the vessel's draft. The decks and bulkheads in the hold where the damage is found are strengthened and made as nearly air-tight as possible, and air is injected under high pressure by means of air-compressors. The water is thus forced out of the hold, and the necessary buoyancy obtained to enable the vessel to be floated. If the operations are successful, the vessel would then probably proceed into the nearest convenient port for temporary repairs, and subsequently

proceed to her destination when sufficiently seaworthy ; in most cases with a large part of the cargo still on board. The portion of the cargo which had been discharged while she was aground would probably have been forwarded in the meantime to a place of safety in other bottoms.

This represents a typical case of salvage operations under modern conditions, and, provided that no material alteration takes place in the circumstances during their progress, it would be difficult to say that the whole series of operations ought not to be treated as general average. It very seldom occurs that the cargo, as a whole, is in a place of safety at the time when the vessel is finally floated. A portion may be, but then its removal was part of a complete and premeditated scheme for the rescue of the ship and cargo, and it probably owed its selection to its having been fortunate enough to be stowed in the upper part of the ship. For these reasons it is usually the case, in practice, for the complete cost of complex salvage operations to be treated as general average, at any rate up to the point of time when the safety of all the property at risk has been attained.

Other cases may arise, of course, in which it is clear from the outset that the salvage will be of the nature of a "sauve qui peut," or in which the conditions will be similar to those that prevailed in the case of *Job v. Langton*, in which the whole of the cargo was discharged and in safety before any attempt was made to float the empty vessel, and in such cases it is obvious that the same treatment of the expenses incurred will not be justifiable.

Apart, on the one hand, from cases like the typical one described, in which the whole series of operations has been planned at the outset and undertaken with the

object of saving both ship and cargo, and on the other from cases in which it must be taken that the purpose of removing part of the property at risk was its own preservation and that only, the rule to be derived from the legal authorities seems to be that a line ought to be drawn whenever there is a distinct change in the nature of the operations, and that if by means of the operation which has just been finished part of the property has been placed in safety, that part should cease to contribute to the cost of the operations which follow.

The editors do not say that this rule is not open to criticism. It seems, indeed, impossible, in the case of the operations under discussion, to make an adjustment to which no exception can be taken on theoretical grounds. A rigid application of the principle underlying the rule is impracticable; for, as Mr. Lowndes points out (*t*), it would require a separate adjustment for each portion of the cargo, however small, as it is placed in safety. Is, however, the impracticability of giving complete effect to a principle a reason for not giving effect to it as far as possible?]

When vessel
voluntarily
stranded or
sunk.

What remains to complete this chapter is comparatively simple. We have been thus far discussing the case of a stranding, or a sinking, which has been the result of accident without fault. If this mishap had been the result of fault on the part of any servant of the shipowner, the question would not arise unless by the contract of affreightment he was exempt from liability for the default of his servants, since the entire expense of saving both ship and cargo must fall on the shipowner. If the stranding or sinking was voluntary, and in itself a general average act (*tt*)—as, for example, if the ship have been run aground to scuttle her and

(*t*) *Ante*, p. 186.

(*tt*) See *ante*, § 36.

extinguish a fire, or to prevent her sinking in deep water, or to escape the pursuit of an enemy,—then the cost of floating or raising both ship and cargo, with all the incidental expenses till both are again placed in a condition to continue the voyage, must be borne as general average. Here, also, it is unnecessary to discuss whether the earlier and the later stages are to be treated as one or two operations.

Returning, then, to the case of an accidental stranding or sinking, it is to be remembered that we have been speaking only, thus far, of the expenses of removing the ship and cargo, from the strand or bottom, to the nearest place of actual safety. This very often is only the first portion of the extraordinary expenditure which the accident has necessitated. The cargo may be in safety, but on rocks, or on a beach above high-water mark, or on open fields; it is at all events safe from perils of the seas(*u*). It may be of little or no value, however, in that position; it must be removed either to a market or to a port of shipment for its own or some other market. Here we come upon a fresh set of complications. Who is to bear the expense of this removal from a place of bare actual or physical safety to one of mercantile safety? Shall this be treated as general average, as a charge on the specific cargo saved, or on the freight, or on the cargo and freight conjointly?

If the discharging of the cargo is a genuine sacrifice,—*i.e.*, as in our Thames case,—it is clear that the removal from the open fields (let us say) to a proper place is no more than the completion of the act of

(*u*) It may, however, be necessary to remove the cargo to another place for shelter, or to be conditioned. In this case the place mentioned in the

text would not be considered a place of safety: *Rose v. Bank of Australia*, [1894] A. C. 687, *infra*.

discharge, and must form part of the general average: and equally so if the discharging is the result of some antecedent sacrifice, as in the case of a voluntary stranding. But, supposing that we are right in accepting Mr. Carver's rule, or some such rule, for the treatment of these salvage expenses, and that the case before us is one that on that rule must be treated as specific or *sauve qui peut*, then it must follow that, in this case, not only the cost of first saving this property, but also the cost of removing it from the place where it was first deposited to a place of sale or shipment, must be a specific charge on that property.

But there is this peculiarity about goods *in transitu*, that besides belonging to their owners they may in a qualified sense be said to belong to the shipowner, in respect of the rights he has over them for securing his freight.

When the goods have been brought into physical safety, the ship being still stranded or sunk, and her fate yet uncertain, the shipowner's lien on them for freight is by English law not necessarily done away with, but in a sort of suspended or torpid condition. He is entitled to hold to the goods for a reasonable time, to see whether he can get the ship afloat or raise her, repair her, and make her fit to take the goods abroad and earn his freight; or whether, if this cannot be done, he can earn his freight in another way, *e.g.*, by carrying the goods to their destination in another vessel provided by himself as a substitute for the original ship (*v*).

Supposing that the shipowner is able to float and repair his own ship, within a reasonable time, and has brought her to the loading port nearest to the rocks, sands, or other place where the goods thus saved were

deposited, and there lies ready to take the goods on board—Who is to bear the expense of bringing the goods to the ship?

We are supposing, it must be remembered, that there is in the case before us no question of general average. The cargo was taken out of the ship for its own safety. Theoretically, on Mr. Carver's principle, the expense of taking it out should be charged to the cargo and freight on it conjointly: the ship and freight conjointly (*x*) are made to bear the expenses of floating and lifting the ship: the ship alone bears the expenses of repairing. If the cargo first saved, instead of being deposited on sands or fields where it was of no value, had been carried at once to the port where the ship would have been ready to take it in, as is sometimes done, the whole cost of carrying it thither would have been treated as the cost of saving the cargo, and should accordingly, on the above theory, have been a charge on the cargo and freight conjointly.

On these facts, it is conceived that the cargo and freight conjointly should bear the expense of bringing this cargo to the place where the repaired ship is lying, or will come to lie, ready to receive it. It is an extraordinary expense resulting from an accident affecting the cargo: it is in fact a part of the operation of saving the cargo, for where the cargo was first placed it was not properly to be called in safety, being exposed to pillage and many other dangers, and of no value. In confirmation of this view, may be cited the opinion of M. Smith, J., above cited, to the effect that the saving

(*x*) The conjunction of the freight to the ship or goods, according as the saving of ship or goods may carry with it the saving of the freight, is clearly established by Lord Campbell's judgment in *Moran v. Jones*, ante, p. 192.

of cargo from a desolate island where it would be of no value must be treated as equivalent to the saving of it from total loss (y).

The cost of loading the cargo on board the ship, however, in such a case, always is, in practice, a charge upon the freight (z).

Case where
freight earned
by substituted
ship.

Supposing, in the second place, that the ship is not floated or raised, or is found not capable of repair so as to carry the cargo, and the shipowner avails himself of his privilege of substituting another ship, and sends it to the nearest port to fetch the goods, it seems obvious that the same principle should apply: the cost of bringing the goods to the port should be a charge on the cargo and freight, and the cost of loading the goods should be a charge on the freight alone (a).

(y) Per M. Smith, J., in *Waltheu v. Macrojani* (1850), L. R. 5 Exch. 116; *ante*, p. 198.

(z) Whether this is right in theory, I do not here discuss. The question is, no doubt, closely connected with that considered in *Svendson v. Wallace* (see *post*, Chap. V.), where the cargo has been landed for the common safety: but here, where the cargo has been taken out for its own safety merely, it is certainly not a matter of course that the conclusion would be the same as in that decision. The present practice, however, unquestionably is to treat the cost of re-loading as a charge on freight.

(a) The question which has just been considered was raised in *Rose v. Bank of Australia*, [1894] A. C. 687; but under the circumstances of the case it was unnecessary in the House of Lords to decide it. The *Sir Walter Raleigh*, with a cargo of wool, went ashore at Audresselles, near Boulogne. The cargo was landed and carried to the top of the cliff, whence, after remaining for a time in an open

field, it was conveyed by cart to Boulogne. Much of it had been damaged by sea water, and at Boulogne steps were taken to save it from deterioration. After the cargo had been landed (exactly when is not stated) the attempts to get the ship off the ground were abandoned; and after the cargo had been brought to Boulogne the shipowner elected to forward it to its destination in order to earn the freight. The Court of Appeal held that after the cargo had been placed in the field the expense of removing it to Boulogne must be charged to the freight; but this decision was reversed in the House of Lords. "It seems to me," said Lord Herschell, L. C., "that when once the conclusion of fact which I have stated is arrived at, that the cargo was not safe where it was at Audresselles, and that if the safety of the cargo alone be regarded it ought to have been taken to Boulogne, it is impossible to say that this can be treated as an expenditure on account of freight." He then dealt with the

[When the ship has gone ashore, or some other maritime disaster has happened which imperils the whole adventure, the shipowner is bound to use his best endeavours in the interest of all parties concerned. There is, however, no rigid rule of law that he is bound to do everything himself; and in a proper case he may employ experienced persons to act for the benefit of all parties, and charge their remuneration as a general average expenditure (*b*).]

§ 43. It must be borne in mind, however, that the shipowner's position as to freight may be materially affected by the crew's abandoning the ship during the voyage; as, for instance, by their taking to the boats, or otherwise leaving the ship to save their lives. In the case of *The Kathleen*, this ship, laden with a cargo of cotton bound for Bremen, was run into, in the English Channel off Hastings, by a vessel called *The Mallowdale*, which cut her down and did great damage to her. For this collision *The Mallowdale* was solely to blame. Next morning the master and crew of *The Kathleen* justifiably abandoned her, she having become unmanageable, and they went on board *The Mallowdale*. Subsequently *The*

Ship left
derelict.

argument that when the expenditure was incurred, the shipowner had elected to carry the cargo on, and therefore incurred it on account of his freight, although incidentally it benefited the cargo. There had been no such act of election, said his lordship; and after repeating that under the circumstances the expenditure could not be charged against the freight, he concluded: "It is not necessary to say whether it is to be treated as a general average charge, or whether it is to be treated as a charge against cargo and freight. One or other of those views, according

to my judgment, must be the correct one, and it is not essential to determine which."

(*b*) *Rose v. Bank of Australia*, [1894] A. C. 687, disapproving *Schuster v. Fletcher* (1878), 3 Q. B. D. 418. The House of Lords also held that he was entitled to charge against the cargo-owners the commission paid to a merchant for arranging the sale of unidentified portions of the cargo; and Lord Herschell considered (p. 697) that there might be circumstances under which he might even charge for his own services.

Kathleen was boarded by salvors, and taken into Dover, where the ship and cargo were arrested under Admiralty process for salvage. Thereupon the owners of the cargo applied for an order of the court to have the cargo, which was alleged to be deteriorating in value, sold on the spot. The owners of the ship objected to this course, and claimed to set aside this application, asking the court, on the contrary, either to order that the owners of *The Kathleen* should be allowed, on giving bail in the salvage suits for the cargo, to carry the cargo on to its destination in order to earn freight, or to order that, if the cargo were sold at Dover, the amount of freight should be paid out of the proceeds. The court first ordered the removal of the cargo to London for sale, this being the best course in the interest of the cargo itself, it being too badly damaged to bear the delays of a voyage to Bremen. As to the claim for freight, Sir R. Phillimore decided that there was none. "The owner," said the learned judge, "had abandoned all possession of the ship, and at the time of abandonment had certainly lost all rights to freight or to carry on the cargo" (c).

In the case of *The Cito*, a Norwegian ship, the decision was much to the same effect. This vessel, with a cargo of resin in barrels, bound to Rotterdam, was, owing to the perils of the sea, abandoned by her crew off the American coast, picked up by salvors, carried into Plymouth, and there arrested by the salvors. The owners of the cargo, as in *The Kathleen's Case*, claimed the right to settle with the salvors, and take delivery of their cargo without payment of freight. This the ship-owners resisted, and the question between them was carried to the Court of Admiralty. That court considered itself bound by the precedent of *The Kathleen*,

and gave judgment in favour of the cargo. This was appealed against, but the Court of Appeal confirmed the judgment.

Brett, L. J., said: "Many interesting points have been discussed in this case about which it is not necessary to give any decided opinion. It has been said that such an abandonment of a ship as to make it a derelict, together with a subsequent seizure by any one who finds it, makes such seizure the seizure of a droit of the Admiralty, and alters the property in the ship. If that were made out, it would strongly support the case for the respondents; but I am not, however, prepared to say that such a proceeding would take the property in the ship out of the owner; and for the present purpose I will assume that it does not. It has been also urged that the abandonment of a ship puts an end to the contract of affreightment. I am not prepared to say it does. Suppose a wrongful abandonment, without its being occasioned by the perils of the sea, it is clear that in that case the owner of the cargo might sue the shipowner for his breach of contract, so it cannot be said that it puts an end to the contract of affreightment. It is sufficient, I think, for the determination of the present case, to say that by the abandonment of a ship without any intention to retake possession of it, the shipowner has, so far as he can, abandoned the contract, so as to allow the other party to it, the cargo-owner, to treat it as abandoned."

The learned judge proceeded to point out that, before the owners of *The Cito* had taken any action, and while, therefore, the cargo-owners were entitled to treat the contract as abandoned, these cargo-owners had demanded possession of their own property, expressing their readiness to satisfy the salvors' lien. "We do not decide," he added, "what would have been the result if, after the ship had been brought in as it was by the salvors, and before the cargo-owners had come in and exercised their right to the cargo, the shipowners had given bail for the ship and cargo, and had carried the cargo on" (*d*).

Cotton and Lindley, LL. J., concurred.

(*d*) *The Cito* (1881), 7 P. D. 5, at 10; *Ins. Co.* (1902), 7 Com. Cas. 130 p. 8. See also *The Arno* (1895), 8 (C. A.).
Asp. M. C. 5; *Guthrie v. North China*

CHAPTER V.

EXTRAORDINARY EXPENDITURE.—PART II.



Port of refuge expenses.

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Statement of
the general
question.

§ 44. Next to salvage charges, or the expenditure incurred in saving a ship and cargo from wreck, raising them when sunk, floating them when stranded, or otherwise rescuing them from imminent total loss—if not even before these in importance, on account of its greater

frequency—comes the expenditure incurred by entering a port of refuge to repair damage. This step on the part of the master is always one of grave responsibility. If taken without sufficient justification, it exposes his employer to the heavy penalties of deviation; cancelling from that point all insurances, and throwing on the shipowner alone the entire future risk of the voyage both as to ship and cargo (*a*). On the other hand, there are occasions on which the safety of the ship and cargo, and the lives of all on board, may make it imperative on the master to take this step. When resolved on, it is a measure involving sacrifice—the sacrifice of so much time and money. At first sight, therefore, it would seem that the act of putting into a port of refuge, if justifiable, must fall within the definition of an act of general average.

Can it be said, however, that when the ship has been damaged by an accident, so as to have been rendered unseaworthy, it immediately becomes the duty of the shipowner to take measures, at his own expense, to restore her to that seaworthy condition which he has guaranteed for her? If so, can it be said that the master's act in bearing up for the nearest place where the ship can be repaired is no more than his duty under this implied warranty of seaworthiness?

Or, if neither of these views can be accepted, each being regarded as extreme on one side or the other, ought some intermediate course to be taken; as, for

(*a*) The effect of a deviation is even greater. A series of recent cases has established the rule that the deviation goes to the root of the contract, so that the shipowner cannot avail himself of any of its stipulations in his favour. (See *Balian v.*

Joly (1890), 6 Times L. R. 345 (C. A.); *Joseph Thorley, Ltd. v. Orchis S.S. Co.*, [1907] 1 K. B. 660 (C. A.); *Internationale Guano en Superphosphaatwerken v. Macandrew*, [1909] 2 K. B. 360; *Kish v. Taylor*, [1911] 1 K. B. 626 (C. A.).

instance, by laying down the rule, that the expense of going *into* the port of refuge, and thereby rescuing the ship and cargo from the condition of danger to which they were exposed while on board a damaged and unseaworthy ship, should be treated as general average; while the subsequent expense, during the stay in port to repair the damage, and the cost of re-loading the cargo and putting to sea again, should fall on the shipowner or his underwriters on ship and freight?

This question has given rise to a controversy sufficiently important and instructive to be here set forth at some length.

Former state
of practice in
this country.
and early
decisions.

§ 45. The state of things, at the time when the question was first seriously brought before the courts, was as follows:—

In most countries except Great Britain the entire expense incurred by putting into a port to repair was, and is, treated as general average: that is to say, the pilotage and port-charges going into the port and coming out; the cost of discharging the cargo, whether for its own safety or that of the ship, or both, *e.g.*, if the ship were leaky and the cargo damaged; or to repair the ship, *e.g.*, to lighten her and enable her to enter a dry dock; the warehouse-rent of the cargo so discharged, and the cost of re-loading it. On the other hand, the cost of repairing the ship at the port of refuge was not so treated. This was dealt with in the same way as if the repair had been deferred until the ship reached her destination: that is, as general average if the damage were occasioned by a sacrifice for the common safety, but not otherwise. This item was not treated as a part of the sacrifice involved in bearing up for the port of refuge, since the ship must have been repaired sooner or

later. With some unimportant exceptions, which are pointed out in the Appendix, this may be said to have been the universal rule over the Continent and in North and South America.

In England, for a long period, as may be gathered from the older writers, such as Beawes and Magens, the same rule prevailed in practice. But about the time of Stevens, or it may be some hundred and fifteen years ago, a practice somehow grew up amongst English adjusters, which amounted to this, that so much only of the expense of putting into port to repair should be treated as general average as was incurred up to the time when the ship and cargo were placed out of danger. That is to say, the pilotage and port charges incurred in going into the port of refuge, and the expense of discharging the cargo, whether for safety or to repair the ship, were treated as general average; but all subsequent expenses were allotted to the particular interests immediately concerned,—the warehouse rent of the cargo was made a specific charge on the cargo, and the expenses of setting forth again on the voyage, *e.g.*, the cost of re-loading the cargo, and the outward pilotage and port charges, were treated as a specific charge on freight (*b*).

This treatment was applied indiscriminately to all cases of putting into a port of refuge, no matter whether the damage to the ship which occasioned the putting in had been the result of an accident, or of a sacrifice for the common safety, such as the cutting away of a mast. In the latter case, indeed, the result was paradoxical enough, for if the sacrifice of the mast necessitated the going into port and discharging cargo, it no less necessitated the re-loading and coming out again when the

(*b*) The feeble beginning of this earlier editions of Stevens on Average, practice may be seen in some of the and in Benecke.

mast had been replaced. All alike were the natural consequences of the sacrifice.

[The uniformity of treatment in all these cases derives some support from Lord Ellenborough's judgment in *Plummer v. Wildman* (c), though, as the court seems to have held in that case that the expense of warehousing and re-loading the goods was general average, the decision does not in this respect agree with the practice referred to (d).]

Eventually, the practice, after holding its ground for almost a century, was assailed, and has been partially modified, as will appear from the following decisions:—

*Atwood v.
Sellar.*

§ 46. The ship *Sullivan Sawin* (c), on a voyage, in the year 1877, from Savannah for Liverpool, met with a gale, in which, for the general safety, the master was compelled to cut away her foretopmast, and this in its fall did such damage to her hull that the master was obliged to put into Charleston to repair it, for which purpose he had to discharge a portion of the cargo and to place it in a warehouse. After repairing, this cargo was re-laden, and the vessel then completed her voyage to Liverpool. The case (which was an agreed case settled by an arbitrator) then set forth the practice of adjusters, which, it was stated, had been for the last

(c) (1815), 3 M. & S. 482.

(d) Lord Tenterden (Abbott on Shipping, 5th edit. p. 347) and Arnould (Ins. 2nd edit. vol. 2, p. 920) also lay down the rule that, even when the ship has put into port to repair particular average damage, the warehousing and re-loading charges are general average. Benecke, on the other hand (p. 192), distinguishes between putting into port to repair

general average and particular average damage. In the former case he considers that all expenses should be allowed in general average; in the latter that the cause for general contribution ceases as soon as the object of putting the vessel and her cargo in safety is accomplished.

(c) *Atwood v. Sellar* (1879), 4 Q. B. D. 342.

seventy or eighty years, and then was, in all such cases, whether the putting in were, as in that case, the result of a sacrifice, or of a mere accident, to allow in general average the expense of going into port and discharging the cargo, but to treat the warehouse-rent as a special charge on the cargo, and the re-loading, together with the outward port-charges, as a special charge on the freight. "Average adjusters," it was added, "regulate their rules of practice in accordance with what they consider are the legal principles applicable to the subject. There is an association of average adjusters which holds meetings from time to time, at which the rules of practice are discussed and altered or modified with reference to legal decisions."

The plaintiffs in this case claimed that the whole of the expenses above enumerated should be treated as general average. The defendants contended that they were only liable to pay in conformity with the practice.

At the first trial, in the Queen's Bench Division, judgment was given, by a majority of the court, in favour of the plaintiffs (*f*). Manisty, J., who was in the minority, rested his conclusion on the following grounds:—

"I am of opinion," said the learned judge, "that in the absence of any evidence to the contrary, the usage and practice of average adjusters for so great a length of time must be deemed and taken to have existed from all time, and to have been acquiesced in, and so to have become the usage and practice of shippers and ship-owners" (*g*). "I am at a loss to comprehend," the learned judge continued, "how the law of any particular nation as to general average can be arrived at except by ascertaining what has been, as a matter of fact, the usage and practice of such particular nation with regard to it." In confirmation of this, the learned judge cited a passage from the judgment of Abbott, C. J., in *Simonds v. White*, when, after laying down that the proper place for adjusting a

(*f*) *Atwood v. Sellar* (1879), 4 Q. B. D. 342.

(*g*) *Ib.* at p. 349.

general average was the port of destination, the learned Chief Justice went on to say that, as a consequence of this rule, the average should be adjusted "according to the *usage* and law" of that place (*h*); secondly, Manisty, J., considered that the decision, or at least some expressions used by Bovill, C. J., in *Walthew v. Marrojani* (*i*), were very pertinent to the present case. Lastly, the learned judge could draw no distinction in point of principle between the present case and that in which the first cause of putting into port was an accidental damage suffered by the ship. "I think it much safer," he concluded, "to adhere to a usage which has been acted upon, for aught that appears to the contrary, ever since England adopted the law of general average, than to introduce a new usage for no other reason, that I can perceive, than that such new usage would be more consonant with strictly logical principles. Such an alteration ought, in my opinion, to be effected, if at all, by legislation, and not by a decision of a court of law" (*k*).

Cockburn, C.J.

Cockburn, C. J. (with whom Mellor, J., concurred), was of a different opinion. He began by considering what, independently of the practice of average adjusters, is the principle or rule of law applicable to this case. That the expenses in question—those of quitting the port, and of warehousing and re-shipping the cargo—"should, according to legal principles, be made the subject of general average, appears to me," said his lordship, "to flow necessarily from the fundamental principle on which the whole doctrine of general average rests; namely, that all loss which arises from extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, must be borne proportionably by all who are interested.

"The contract between the goods-owner and the shipowner, on a charter-party or a bill of lading, being for the conveyance of the goods to a given port, there occurs in the course of the voyage a state of things which is not provided for in the contract. A storm arises; the vessel is in danger; but a port is within reach, in which, in the common interest of all concerned, it would be prudent to take refuge. Or it becomes necessary to cut away a mast, and, as the consequence of so doing, to seek an intermediate port in order to replace it. Or the ship sustains damage from the violence of winds or waves which renders it necessary, for the common safety

(*h*) *Simonds v. White* (1824), 2 B. & C. 805; cited 4 Q. B. D. at p. 349. (*i*) (1870), L. R. 5 Exch. 116; cited 4 Q. B. D. at p. 351.
(*k*) *Ib.* at p. 352.

of ship and cargo, and for the further prosecution of the adventure, to seek a port at which repairs which have become necessary for the safe prosecution of the voyage may be effected. The result is that, in theory at least, a new arrangement not contemplated or provided for by the original contract takes place between the parties, who in theory, as formerly in fact, must be supposed to be present, each in the practice of modern times represented by the master, to whom the interests of both are committed. If we could suppose both parties to be actually present, and under a sense of imminent danger to concur in the necessity of seeking a port of refuge, but to be discussing the question as to how the expenses incidental to such a course should be borne, what arrangement could be more reasonable or just than that these expenses, being extraordinary expenses incurred for the common benefit, should be borne in common, on the same principle as that which has been established from the earliest times in the case of actual jettison?

Theory, that a new arrangement not contemplated in the bill of lading, is entered into on the spot.

“Applying this principle with reference, in the first place, to the expenses incurred by the ship, it is admitted on all hands that the expenses of entering the port of refuge should be carried to general average. Logically, it would seem to follow that, as the coming out of port is—at least where the common adventure is intended to be, and is, further prosecuted—the necessary consequence of going in, the expenses incidental to the later stage of the proceeding should stand on the same footing as the former. The further prosecution of the voyage was in the contemplation of the parties, or of the master as representing them, in going in; the coming out, therefore, as essential to the further prosecution of the voyage, must equally have been in view when the resolution to go in was formed” (*l*).

Up to this point the true position of the question is most admirably set forth; but unfortunately the learned Chief Justice does not seem to have been equally successful in grappling with some of the difficulties which had been presented to him in argument. To an objection, for example, based on its being the ship-owner's duty to repair and then to proceed—an objection which can readily be answered, but in quite another

way (*m*)—Cockburn, C. J., answers, by maintaining that it is not in any case obligatory upon him to repair his ship and complete his contract, if he is content to give up his freight. This opens a large question, which his lordship discusses at great length, and arrives at conclusions which several of the learned judges who came later upon the stage strongly dissent from. The question, however, as Cockburn, C. J., himself points out, but not until he has exhausted it, has no necessary bearing upon the controversy at present before us; and it may here be passed over, especially as it is to be more fully considered in this volume in a more convenient place (*n*). Another thing which has tended to weaken the effect of this judgment is that, from several expressions used in it, it appears that the learned judge has not always sufficiently limited the end in view, requisite to constitute a general average act, to the attainment of safety; inclining a little, as it seems, to the doctrine that what is done for the completion of the common adventure or voyage may give rise to a general average. There is, however, no reason to think that any *heresy* of

(*m*) It might be answered, for example, by pointing out that the argument proved too much, since if the ship can only be saved by cutting away a mast, it is the master's duty, and therefore obligatory on the owner, to cut it away. (See Chap. I.)

Or, it might be said, if we were to go behind the immediate motive which induces a sacrifice to the ulterior causes or inducements which may call that motive into play, we should make havoc with the most elementary rules of general average. Is a jettison, for example, not general average because it has been necessitated by a leak, which again was caused by a damage to the ship,

which damage it was the master's duty to repair at once at his own expense? Suppose, therefore, that he might have saved the ship without a jettison by putting in at a port of refuge close at hand—but at an expense greater than the value of what is jettisoned—would the master be bound either to bear up, that is to say, to incur a greater loss in order to save a lesser; or should the ship-owner bear exclusively a certain proportion of the loss by jettison, proportionate to that which he would have borne had he put into port to repair?

(*n*) *Post*, pp. 272—275, n. (*n*).

his on this point taints or affects the reasoning of the passage I have cited. There is much in the later portion concerning which so much cannot be said; but all this may be passed over as being certainly now overruled and of no authority.

Coming now to the second question—the degree of authority to be assigned to the practice of adjusters in times past—the learned Chief Justice said that, if found at variance with legal principles, it could not prevail, or be considered as having settled the law.

On the
practice of
adjusters.

“The practice in question,” he said, “is not a usage of trade by which the terms of a contract may be interpreted or modified. It is not the *inveterata praxis* of a court or courts having judicial authority, and which must, therefore, be taken to be the law though inconsistent with general principles. The authority of average adjusters may be said to be of an anomalous character. By the consent of shipowners and merchants they act as a sort of arbitrators in the settlement of matters of average; but they are bound, in the adjustment of such claims, to follow the law; and in the practice they have adopted they have not acted or intended to act on or give effect to any mercantile usage, but have intended to give effect to what they believed to be the law; but they have mistaken it” (o).

§ 47. The case was carried to the Court of Appeal (p), and was there argued before Bramwell, Baggallay, and Thesiger, LL.J. One of the arguments used by counsel for the defendants was, that there was

Atwood v. Sellar in the Court of Appeal.

(o) 4 Q. B. D. 342, at p. 363. See also the directions of Cockburn, C. J., to the jury in *Achard v. Ring* (1874), 31 L. T. (N. S.) 647. In *Pirie v. Middle Dock Co.* (1881), 44 L. T. 426, Watkin Williams, J., says:—“The still more recent case of *Atwood v. Sellar*, in the Court of Appeal, was a further blow to the supposed custom and usages which were supposed to

differ and distinguish the law of general average in England from that universally accepted, and it might now be fairly established that this important branch of our commercial law is governed by the principles of the common law of England, embracing within it the principles of the general maritime law.”

(p) (1880), 5 Q. B. D. 286.

an inconsistency on the plaintiff's part, in professing to claim as general average the entire expense occasioned by putting into port and yet not claiming (presumably because he had no right to claim) the wages and keep of the master and crew during the detention. This argument, as will be seen, was dealt with in the judgment. The Court of Appeal unanimously confirmed the judgment of the Queen's Bench Division. Their judgment was delivered by Lord Justice Thesiger.

Thesiger, L. J.

"The question raised by this appeal," said the learned Lord Justice, "is, whether in the case of a vessel going into port in consequence of an injury which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average also.

"The matter came before the court below in the form of a special case, and upon it the court decided in favour of the plaintiffs, who assert that the expenses in question are the subject of general average. The special case states a long-continued practice of British average adjusters, in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average; and the expense of warehousing it as particular average on the cargo, and the expense of the re-shipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight. It was not, however, and could not reasonably be contended for the defendants, that the practice could be put so high as a custom impliedly incorporated in the contract between the parties; and during the course of the argument we intimated our opinion, founded on the language of the special case with regard to this practice, and, especially, the language of the fifth paragraph (*q*), that the question

(*q*) The fifth paragraph is—"Average adjusters regulate their rules of practice in accordance with what they consider are the legal principles ap-

plicable to the subject. There is an association of average adjusters which holds meetings from time to time at which the rules of practice are dis-

between the parties must be decided in accordance with legal principles and authority which the practice of the average adjusters professes to follow.

“As a matter of principle, we are clearly of opinion that the judgment of the majority of the court below in favour of the plaintiffs was right. The principle which underlies the whole doctrine of general average contribution is that the loss, immediate and consequential, caused by a sacrifice for the benefit of cargo, ship, and freight, should be borne by all. This principle is, in the abstract, conceded by counsel for the defendants, and its application to the present case is admitted to the extent of allowing the expenses of unloading the goods, for the purpose of doing the necessary repairs to the vessel to enable it to proceed on its voyage, to be the subject of general average contribution; but they attempt to distinguish such expenses from those of warehousing and reloading the cargo, and of outward port and pilotage charges, by the suggestion that the common danger to the whole adventure is at an end when the goods are unloaded; and that general average ceases at the point of time when the common danger is at an end. The proposition is, as will appear later, sound when applied to cases in which a ship is damaged by a peril of the sea, and, before any voluntary sacrifice, such as putting into an intermediate port, is made, the goods are unshipped and in safety; but its application to a case like the present is not admissible. A vessel which has put into port to repair an injury occasioned by a general average sacrifice may be, and generally is, when in port, in perfect safety; and if by the expression ‘common danger’ be meant danger of actual injury to vessel and cargo, there is no more danger to the goods when on board the vessel being in port than when stowed in a warehouse on shore; and, indeed, in many cases only a portion of the goods is removed from the vessel in order to do the repairs to her, while the remainder of the goods is left on board. If, on the other hand, by ‘common danger’ be meant the danger of the vessel, with her cargo, being prevented from prosecuting her voyage, then there is no more reason why the expenses of warehousing and reloading, and the expenses incurred for pilotage and other charges paid in respect of the vessel leaving port and proceeding on her voyage, should not constitute general average, than there is reason

Principle: loss, immediate and consequential, caused by sacrifice, is borne by all.

Does discharging cargo come within that principle?

If it does, so does reloading.

cussed and altered or modified with reference to legal decisions.” (4 Q. B. D. at p. 343.)

The whole thing, in and out, is one operation.

for saying that unloaded and warehoused goods should not contribute, as it is clear in a case of voluntary sacrifice that they must, to the expenses of the necessary repairs" [*i.e.*, general average repairs] "to the vessel. Both classes of expenses are extraordinary expenses consequent upon the voluntary sacrifice, and necessary for the due prosecution of her voyage by the vessel with her cargo. Neither class can, as a general proposition, be said to be incurred exclusively for the benefit of either ship or cargo. In some cases it might be for the interest of a shipowner to terminate the voyage at the port where the vessel puts in to repair a disaster, while it might be all-important for the goods-owner to have his goods carried on by the same vessel. In other cases the position of the parties might be reversed; *but however this may be, the going into port, the unloading, warehousing, and reloading of the cargo, and the coming out of port, are, at all events, parts of one act and operation, resolved upon, and carried through, for the common safety and benefit, and properly to be regarded as continuous.* The shipowner is at least entitled to reship the goods and prosecute his voyage with them; and the expenses necessary for that purpose, being *ex hypothesi* consequent upon a damage voluntarily incurred for the general advantage, should legitimately be the subject of general average contribution; or, to use the language of Lord Tenterden in his work on Shipping, 'If the damage to be repaired be itself an object of contribution, it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution; the accessory should follow the nature of its principal.'

Objection: if so, why not claim crew's wages and provisions?

"But it is said for the defendants that if this be so, and the principle be carried out to its logical consequences, expenses incurred for wages and provisions should equally form the subject of general average; and if it is, as they suggest, undeniable that they do not, the principle must itself either be faulty, or at least not recognized in English law. As a matter of fact, it is extremely doubtful whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by our courts, as constituting a claim for general average, in a case where the ship has put into the port to repair damage itself belonging to general average; but, even if the assertion were correct, the conclusion drawn would by no means follow. That the principle in question is not faulty we have endeavoured to show in the observations already made, and the view we have taken upon the point is strongly confirmed by the fact that it is recognized and carried to its so-called

logical consequences as regards the wages of crew and provisions in all other countries than our own. That the principle is not recognized in English law is not proved by showing that expenses incurred for wages of crew and provisions have been under certain circumstances disallowed as the subject of general average, unless it be shown—which it has not been to us—at the same time that they have been disallowed upon grounds that negative the principle; and it is disproved if it be found that, notwithstanding such allowance” [*qu. disallowance*], “the expenses in question in this case have been allowed. All that in such a case can be said is, that either the courts have made a mistake in limiting the application of the principle, or that its limitation is due to some real or supposed rule of public policy.

“If, then, the question before us stood only upon principle, we should have no hesitation in deciding it according to the principle we have stated, and it, at least, may fairly be asked what other principle, if it be not correct, is to be substituted in its place. But the authorities remain to be considered” (*r*).

The learned judge then proceeded to give a careful analysis of the conflicting decisions and dicta above referred to, and concluded as follows:—

“The result of this review of the authorities is to confirm the opinion which, apart from authority, we entertain and have already expressed upon the question submitted to us. The practice, then, of the average adjusters, as stated in the special case, appears to us to be neither founded upon true principles, nor to be in accordance with the views of the text-writers, and, so far as there is case authority upon the matter, it appears to us to be opposed to legal decisions. It is a practice, too, which has not been, as the practice in *Stewart v. West India and Pacific Steamship Company* (*s*) was, made a part of the contract between the parties, and therefore constitutes no impediment to our giving effect to the objections to its validity; and in deciding as we do, that the judgment of the majority of the court below was right and should be affirmed, it is satisfactory to us to know that the law, as laid down in the judgment of the court below and of this court, is placed upon a footing which more nearly

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(*r*) *Atwood v. Sellar* (1880), 5 Q. B. D. 286, at pp. 288—291.

(*s*) (1873), L. R. 8 Q. B. 88.

assimilates it, in matters in which assimilation is desirable, to the law obtaining in other mercantile communities" (t).

*Scendsen v.
Wallace.*

§ 48. This decision was regarded as conclusive on the question immediately before the courts, where the ship had put into port on account of a sacrifice, and no attempt was made to carry the case up to the House of Lords. It was not so clear, however, whether the change of practice was to stop here, or whether it should be extended, as consistency seemed now to require, to the case of putting in on account of accidental damage to be repaired. An early opportunity was taken to bring this question before the courts, in the form of a test case.

This time nothing was to be left to chance, and there were to be no admissions. The advocates of the custom of Lloyd's thought they had made a mistake in treating this custom as a mere practice of average adjusters. Having got a fair and straightforward case, where the facts were simple, they, as defendants representing the cargo, resisted the claim made on them for their share, as general average, of the items in dispute, namely, the cost of warehousing and reloading the cargo, and of the expenses of quitting the port to resume the voyage. This they did on the twofold plea: first, of custom; secondly, of principle. Their first plea was, that there was a certain ancient and well-known custom amongst shipowners, shippers, and consignees of cargo, assured, underwriters, and average adjusters, applicable to voyages from Rangoon to Liverpool (this being the voyage in the case), in virtue of which, when a ship puts into a port of refuge to repair accidental damage to the ship, the cost of warehousing the cargo (meaning the warehouse-rent) was chargeable as a particular charge upon the cargo, and

Plea of cus-
tom.

(t) *Atwood v. Sellar* (1880), 5 Q. B. D. 286, at p. 299.

the expense of reloading it and the outward port charges and pilotage to sea, were chargeable as a particular charge on the freight. This custom they proposed to prove by evidence before a jury. Secondly, they pleaded that, independently of the custom, this mode of treating the expenses in question was right in principle. This second plea, however, would obviously not need to be discussed if the defendants succeeded in establishing the first.

Plea on principle.

The facts were these:—The ship *Olaf Trygvason*, owned in Norway, on a voyage with a cargo of rice from Rangoon for Liverpool, sprung a dangerous leak in bad weather, which obliged the captain, for the safety of ship and cargo, to put into Rangoon for repair. When in port the cargo was necessarily landed in order to repair the ship, and also, as was pointed out in the House of Lords, but not till then, for its own preservation: it was warehoused, and after the ship had been repaired it was re-shipped.

Facts.

One point in the case, which was not noticed until the case reached the House of Lords, and then was so handled as to have a very remarkable effect, was this: a portion of the freight had been paid in advance, and therefore, in accordance, likewise, with the custom of Lloyd's, a corresponding proportion of the cost of reloading, and of the outward port charges, had been debited in the defendant's adjustment, not to the shipowner, but to the charterer, on the ground that the advance, under the terms of the charter, threw the risk of the freight, in respect of the sum advanced, upon the charterer.

Part freight paid in advance.

The fight began, naturally, on the evidence of custom. This was tried at Guildhall, before Mr. Justice Lopes. A number of average adjusters, underwriters, and others, were called to give evidence of the supposed

Evidence of adjusters, &c. as to custom.

custom of trade. None of them, however, it appears, were able to get higher than a practice of average adjusters, accepted no doubt by the parties interested, but accepted only because they believed, apparently as a matter of faith for the most part, that such was the law. When this evidence was concluded, counsel for the plaintiff appealed to the learned judge to say whether there was any evidence of a *custom* to go to the jury; and he ruled that there was not. The evidence, he said, amounted only to this, that average adjusters regulated their practice by what they believed to be the law, and that this practice varied from time to time. He therefore withdrew the case from the jury (*u*).

Lopes, J.

A rule was thereupon obtained for reviewing the decision of the learned judge, and this was argued before Grove and Mathew, JJ., in the Queen's Bench Division. Both judges were of opinion that Lopes, J., was right.

Grove, J.

"The question," said Grove, J., "was, whether this practice could be said to be such a mercantile custom as must be read into and incorporated into the contract, so as to bind the parties. In his opinion, it had none of the general characteristics of a custom, either in its origin or growth. It was merely the practice of certain skilled men, which, if applied generally, would enable experts really to alter the law of the land. He was of opinion, moreover, that the case, so far as the point for their decision was concerned, was governed by the case of *Atwood v. Sellar*, and that the distinctions which Mr. Butt had contended for between that case and the present did not apply to the consideration whether the alleged custom was to have the force of law. In that case the majority of the judges in the court below, and the Court of Appeal afterwards, absolutely discarded the practice of average adjusters. Without, therefore, absolutely expressing any opinion whether the charges should be general or particular average, he was of opinion that the learned judge at the trial was right in holding that there was no reasonable evidence of a usage controlling the contract, and that the rule must be discharged."

(*u*) Times, 4th April, 1882.

Mathew, J., gave judgment to the same effect.

"In his opinion," he said, "the evidence justified a clearer and more conclusive inference against the existence of any usage of trade grounded on the practice of average adjusters than that embodied in the findings of the arbitrator in *Atwood v. Sellar*. All the witnesses seemed to agree that it was the duty of English average adjusters to prepare their statements in accordance with the law, and that they were employed by mercantile men for this purpose, and that it was their custom to adapt their custom to the law as laid down by the court, and to correct their practice from time to time when it was shown not to be conformable to legal principles. In his opinion, therefore, the learned judge was right in his opinion; and he would add, that he thought it would be matter of regret if English average adjusters were embarrassed in their efforts to emancipate themselves from the mistakes of their predecessors by the suggestion that these mistakes were now embodied in the mercantile law, and could be set right by no easier method than by an act of the legislature. He desired, further, to guard himself from being supposed to pronounce any opinion upon the law" (x).

No attempt was made to appeal against this decision. The next step, therefore, was to obtain the judgment of Lopes, J., on the second plea; that is, on the question whether the practice referred to was right in principle. As to this the learned judge, after hearing the arguments, decided against the defendants. He was bound, he said, by the decision in *Atwood v. Sellar*, for he could see no practical distinction between the two cases. "The putting into a port of refuge, if necessary, is an act of voluntary sacrifice, undertaken for the common benefit of the adventure, ship, cargo, and freight, and I think every expense consequent upon it, incurred to enable the ship afterwards to proceed safely on her voyage with her cargo so as to earn the freight, is incurred for the common benefit of the adventure, and is chargeable to general average" (y).

Lopes, J., on question of principle.

(x) *Times*, 10th June, 1882.

(y) *Svensen v. Wallace* (1883), 11 Q. B. D. 616.

Question of principle carried to Court of Appeal.

This question was carried to the Court of Appeal. In this court, for the first time in this litigation, judgment was given, by the majority, for the defendants. The importance of the decision, and the fact that there are important variations in the judgments, renders it necessary, in spite of their great length, to set them forth here pretty fully.

Brett, M. R.

Benefit of common adventure not the true test of general average.

Brett, M. R., at the outset of his judgment, laid it down that in this case the unloading of the cargo was necessary in order that the ship might be repaired, but not necessary on account of any damage to be suffered, or of any damage already suffered, by the cargo (z). He then attacked with much vigour a theory which had been set up in argument for the plaintiff, namely, that all expenses for the common *benefit*, in the sense of being necessary for the completion of the common adventure, or carrying the cargo to its destination in the ship, were the subjects of general average. For "benefit," said the learned judge, read "preservation;" for "common adventure," read "ship, freight, and cargo." If the terms used meant any more than this, the theory set up would be an extension of the governing principle laid down by Lawrence, J., in *Birkley v. Presgrave* (a); "but if the proposition of Mr. Justice Lawrence," said the learned judge, "is the true and accepted law of England, as I think it is, no court now existing has power to alter that principle while it is the law" (b). This principle the learned judge explains in a very remarkable manner, and this explanation furnishes the keynote of his judgment. If he is right, and if this explanation is to be adopted throughout the law of general average, we certainly have all been wrong hitherto. "This proposition," says the learned judge, "read with regard to expenses, will read thus: all loss which arises in consequence of extraordinary expenses incurred for the preservation of the ship and cargo comes within general average. *But the loss which arises from an expense is the expense itself.* Therefore we must read thus: every expense incurred for the preservation of the ship and cargo comes within general average. Applying this rule in its ordinary sense to each item successively claimed as an item of expenditure in respect of which a general contribution in any given

Consequence of an expense is the expense itself.

(z) (1884), 13 Q. B. D. at p. 71.

(a) (1801), 1 East, 220.

(b) *Svensden v. Wallace* (1884), 13 Q. B. D. 69, at p. 76.

case is due, the question must be, Was this item of expenditure, at the moment it was incurred, incurred for the safety of both the ship and cargo? (c)

“We have to apply the rule, as stated by Mr. Justice Lawrence, to the case of a ship putting into a port of distress for repairs in consequence of damage done by sea perils. If there is danger to the preservation of both ship and cargo from destruction if the ship remains at sea, the act of putting into port to repair is an extraordinary act, which may well be called a general average act. If in order to do that act an expenditure is reasonably incurred, that expenditure is a general average expenditure. If in order to do that act, towage, pilotage or inward dues must be paid, those expenditures are all and each general average expenditures. When the ship is in the port of distress for repair, other acts are often done, and other expenditures are often incurred, which must each be considered. Each of these must be considered as if it were the sole act or expenditure, and also whether it may be treated as a part of another act or expenditure. When the ship is in the port of distress, it often happens that the cargo is unloaded and warehoused, or otherwise protected, and, if necessary, manipulated; the ship is repaired, the cargo is reloaded, the ship is taken out to sea, and proceeds on her voyage. When the ship and cargo are in the port, both may still be in danger of destruction, or the ship alone, or the cargo alone. If both ship and cargo are in danger, it is impossible to conceive, as a fact, that anything which can substantially be called repairs can be done to the ship whilst the cargo is in her. The cargo must then be landed for the safety of both. But the ship alone may be in danger, as, for instance, of breaking her back on a falling tide if the cargo be left in her, though the cargo from its nature would not be in danger. In such a case the cargo must be landed solely for the safety of the ship. The cargo alone may be in danger, as if the injured ship be on the ground and safe, but the cargo be perishable if wetted, then the cargo must be landed, but solely for the safety of the cargo. Or it may be necessary to land the cargo, though neither it nor the ship be in immediate danger, or though the ship only be in danger, because the injury to the ship cannot be repaired without the removal of the cargo. In the first case the cost of unloading—treating the unloading as within itself the sole act done—is clearly a general average expenditure. In the second, third, and fourth cases the expenditure, treated as if it were

Can one act
be treated as
part of
another act?

the cost of the sole act done, cannot be a general average expenditure. But we must consider whether any of the three can be treated as part of another act which is a general average act. The only act to which they can be referred is the act of going into port to repair. In the second and third cases which arise, whether the repairs to the ship could or could not be done as a matter of carpentering without the cargo being removed, it cannot be truly said that the landing of the cargo is a part of the act of going into port to repair. In the fourth case, if you take the act of sacrifice to be not merely the going into port, but the going into port to repair, and if the one act be the going into port to repair, and the repair cannot be done without the landing of the cargo, which is the hypothesis, then the landing of the cargo is a part of the act of going into port to repair. It is a part of the act which is done in order to put the ship in such a position that she can be repaired, which is the real meaning of the colloquial maritime phrase, 'going in to repair.' The expression then is, going in for repairs. The real accurate meaning is, going in to be repaired, or going in so as to be in a position which will enable her to be repaired. The landing of the cargo in such case is, upon the hypothesis, so necessary a part of the act of taking the ship into port so as to be in a position to be repaired, that such act cannot be said to be usefully completed until the cargo is landed. This fourth case has always been treated as if the going into port to repair was one act, and as if that were the one act of sacrifice. The cost of unloading has consequently in such case always been allowed as a general average expenditure. Treated in this way, which seems to be a not unreasonable way of treating the case as a matter of business, the allowance of the item is not against the principle of law, and therefore is rightly allowed."

Warehousing
cargo.

Coming now to the subsequent expenses, the learned judge continues:—"When the cargo is landed, it may or may not, according to its own nature, or the circumstances of the locality, require to be warehoused or otherwise protected. It may, in consequence of partial damage already suffered, or from its own nature, require for its own safety to be manipulated, as, for instance, to be unpacked or dried; but such acts cannot possibly be necessary for the safety or preservation of the ship. She is at that moment safe or unsafe; but these acts cannot contribute in any way to her safety if she is unsafe. They cannot be said to be a part of the act of going into port to repair; they have no reference to the act of repairing,

No part of act
of putting
into port.

or of putting the ship into a position in which she can be repaired. They are, therefore, not within the principle. The repairing of the ship has nothing to do with the safety of the cargo; it is done in respect of the ship alone. The reloading of the cargo and the outward expenses are expenses of acts done when both ship and cargo are safe from existing danger, and are, therefore, not within the rule. They cannot be said to be a part of the act of placing the ship in a position to be repaired. Unless, therefore, we are bound by authority to hold otherwise, I am of opinion that, according to the law of England, when a ship is obliged, for the safety of ship and cargo, to go into and goes into a port of distress in order to repair damage done by sea peril, the expenses of going into the port are general average expenses; that if it is necessary for the safety of both ship and cargo to unload the cargo, or if it is necessary to unload the cargo in order to repair the ship, though it is not necessary for the safety of the cargo, the expense of unloading the cargo is a general average expense; but if the unloading of the cargo is not for either of these causes the expense of unloading is not a general average expense. I am of opinion, in the same way and in the same case, that the expenses of warehousing, guarding, or manipulating the cargo, of repairing the ship, of reloading the cargo, of taking the ship out of port, of the charges of going out of port, are not general average expenses" (d).

Conclusion.

The learned judge then gives his reasons for not considering himself bound by the decision in *Atwood v. Sellar* (e):—"If with ordinary rules that case binds us," he said, "I will not hesitate to obey it, though with deference I could not have agreed with it. . . . I do not think that the real ground of the decision in *Atwood v. Sellar* (e) in the Court of Appeal was, that all the acts done in a port of distress are one continued act. What is the one act? By what name can it be expressed? Warehousing the cargo, reloading it, going out of port, cannot be said to be parts of the act of taking the ship into port in order to enable her to be repaired. Reloading the cargo and taking the ship out of port, when the ship is repaired, cannot be parts of the act of repairing the ship. The real ground of the decision was, I think, that where the putting into port for repairs is the necessary consequence of a previous general average sacrifice, the law of England is as elastic in respect

Effect of *Atwood v. Sellar* considered.(d) *Svensen v. Wallace* (1884), 13 Q. B. D. 69, at p. 77.

(e) (1880), 5 Q. B. D. 286.

of the subsequent acts done and expenses incurred in the port as the American and other laws are stated to be in all cases of a ship necessarily putting into a port of distress to repair. And for that proposition there were, before the decision in *Atwood v. Sellar* (f), many weighty dicta by English writers of authority and English judges, but all which dicta threw a distinction between the going into a port of distress in consequence of a voluntary sacrifice, and of putting into port in consequence of a particular average damage. I adopt that distinction because I do not think that we are bound in the present case by the decision in *Atwood v. Sellar* (f), and the propriety of that decision, with reference to the facts on which it was decided, we are not at liberty to question" (g).

Bowen, L. J.

Bowen, L. J., whose judgment I take next, as substantially concurring with that of the Master of the Rolls, said, after setting forth the facts of the case—

General average defined.

"It is essential at the outset to bear in mind two things—the nature of every general average sacrifice and the object of every general average contribution. A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo. There is no difference in principle between a mast voluntarily cut away, an extraordinary expenditure voluntarily incurred, and extraordinary loss of time and labour voluntarily accepted, provided that in each case the sacrifice is made for the common safety in a time of danger. Next as to the object of general average contribution. It is to indemnify the person making the general average sacrifice against so much of the loss caused directly thereby as does not fall to his own proportionate share. This *pro ratâ* indemnity will not be complete without including in the calculation expenses which, though not themselves within the definition of voluntary sacrifice, nevertheless are directly caused by a voluntary sacrifice, and must, therefore, be recouped if the loss which the sacrifice causes is to be borne *pro ratâ*. 'All loss,' says Mr. Justice Lawrence, in the case of *Birkley v. Presgrave* (h), 'which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of ship and cargo comes within general average, and must be borne proportionately by all who are interested.'

(f) (1880), 5 Q. B. D. 286.

Q. B. D. 69, at p. 78.

(g) *Swendsen v. Wallace* (1884), 13

(h) (1801), 1 East, 228.

“The question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average, necessarily depends on the circumstances of each case. Each item of expenditure which is challenged must be considered on its own merits with reference to two tests. The first test is, whether such item itself fulfils, as against some or all of the interests to be considered, the definition of a general average sacrifice; the second is, whether such item, though not itself a general average sacrifice, is nevertheless an expenditure caused or rendered necessary by one. No supposed conveniences of calculation, and no practice of average adjusters, can justify taking one man’s money to pay what by law is another man’s individual loss” (*i*). The learned judge then proceeded to discuss and condemn the “end of the adventure” theory. The only thing he finds in favour of it, in the way of authority, is the decision in *Hall v. Janson* (*k*), where it was held that the unloading and reloading of cargo, for the sake of effecting repairs upon the ship, might give rise to a liability to contribution on the part of freight. “Since freight perishes,” he says, “if the voyage is frustrated, it may not have been unreasonable to hold that freight ought to contribute to the expenses incurred in unloading and reloading a cargo, the unloading of which was solely undertaken for the sake of repairing a ship. This limited proposition, with which alone *Hall v. Janson* (*k*) was concerned, by no means warrants the conclusion that the cargo ought in turn to contribute whenever any expenditure is incurred, not of saving the vessel and its contents, but merely for the sake of prosecuting the voyage. In the subsequent case of *Walthev v. Mavrojani* (*l*), the English doctrine has been restated and explained, and the language of the court in *Harrison v. Bank of Australasia* (*m*) is to the same effect. We have been asked on another and a different principle to depart from the strict English theory in favour of port of refuge expenses following upon a particular average loss, upon the ground that they all form part of a continuous operation, the whole of which was contemplated by the captain at the time when he put into port. The intentions of the captain are no doubt material in considering the question whether the act done by him was performed only for the benefit of his ship, or for the common preservation of both ship and

Concerning consequences of general average acts.

End of adventure not the test of general average.

Hall v. Janson.

Continuous operation theory.

Intentions of master, how far to be brought in.

(*i*) *Svensden v. Wallace* (1884), 13 Q. B. D. 69, at p. 84.

(*k*) (1855), 4 E. & B. 500; 24 L. J. (Q. B.) 97.

(*l*) (1870), L. R. 5 Exch. 116; *ante*, p. 194.

(*m*) (1872), L. R. 7 Exch. 50.

cargo. But it does not follow because his intentions are examinable to this extent, that everything which the captain intended in his own mind to do after common safety should have been attained, also ought to be chargeable to general average. Intentions which go beyond what is needed for common salvation only show that, in addition to intending that which was a general average sacrifice, it was intended further to do something which was not a general average, nor directly caused by one. On such a ground repairs of the ship in port ought themselves to be included, for the captain probably intended these: though he intended them as a means not of saving the cargo, but of earning his own freight. In my opinion the two tests which I have enunciated cannot be qualified or extended so as to embrace any such considerations.

Grounds for treating inward expenses as general average.

“The next step is to apply these two tests to the case before us, the damage which the vessel here received, and which compelled her to put into a port of refuge, being a particular average loss. And first, as to the expenses of putting into port. Two views may theoretically be taken of the act of putting into a port in a case like the present, though such expenses are now universally accepted as general average charges. These expenses might conceivably be considered as an exception to the general law, in virtue of which exception, though the bearing up for port was not a general average act of sacrifice in itself, its expenses are, for the sake of public policy, universally recognized as a subject-matter of contribution. The other and more general view is, that the bearing up for a port is to be treated as an act of general average sacrifice, because it is undertaken as a rule in the hour of danger for the common safety of ship and cargo. (Benecke, p. 192.) For the purpose of the present argument, I will assume that the latter view, which was pressed upon us by the respondents’ counsel, is the more correct.

Discharging cargo.

We come then to the unloading of cargo when the port of refuge has been reached. In practice, it has in recent times become common to carry these unloading expenses to general average, both where the repairs of the vessel have been rendered necessary by a general average act, and where they are rendered necessary by a particular average loss. Nor is it necessary to discuss a practice which may have become inveterate and which is found adequate. Still, if strict theory were to be in each case relied upon, such unloading ought, as it seems to me, to be dealt with specifically in every instance by applying to it the two tests I have named. If necessary for the common preservation of both ship and cargo, the unloading will

be in itself a general average sacrifice: see *The Copenhagen* (n). If not so necessary, it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general average sacrifice.

"It has been maintained by some that the unloading, which is effected to enable the ship to be repaired after a particular average loss, may properly be treated as an act done for the common safety of ship and cargo, on the ground that if the cargo were not unloaded, ship and cargo would both be locked up indefinitely, and the voyage placed permanently in suspension. Reserving to oneself the right to consider any special circumstances arising in other cases from the character of the cargo, or otherwise, that might render unloading necessary for the preservation of both cargo and ship within the meaning of such test, I am unable to adopt the theoretical view that unloading becomes an act of sacrifice simply because it releases cargo and ship from the deadlock that would otherwise ensue. Physical safety has been attained, and it appears to me to be the duty of the shipowner, under his contract of affreightment, either to proceed with his voyage or to land his cargo, unless it is to be transhipped direct. In the case of *Plummer v. Wildman* (o), the unloading of the cargo, which was necessary for the repairs, was charged to general average, but in that case the repairs, owing to an antecedent sacrifice which necessitated them, were themselves held to be general average. In the case of *Hall v. Janson* (p), where the unloading was spoken of as chargeable to general average, the question at issue in the action was as to the liability to contribute not of cargo but of freight. In the present case the unloading expenses have been by common consent, and in conformity with a very common practice, dealt with as the subject of general average contribution, and it is therefore unnecessary to decide what would be in other cases the law on the point.

Deadlock theory rejected.

"The goods having been landed, there is an end of all danger common to ship and cargo. The contest between the parties in the present instance turns wholly on items of expenditure subsequently incurred. These cannot be brought into general average on the ground that they are general average sacrifices in themselves, for the hour of danger and of sacrifice is over. They can only become

Warehousing charges.

(n) (1799), 1 C. Rob. 289.
(o) (1815), 3 M. & S. 482.

(p) (1855), 4 E. & B. 500; 24 L. J. (Q. B.) 97.

so chargeable if it can be shown that they are part of the loss which some antecedent act of sacrifice entails. The first item in controversy which we are asked to consider relates to the warehousing of the cargo. Now, *primâ facie* warehousing the cargo is a charge that ought to be borne by the cargo, which benefits exclusively by it. It may, conceivably, in some cases have been rendered necessary by an antecedent sacrifice, so as to fall within the definition of the loss caused thereby. But the only antecedent sacrifice in the present case was the putting into port for refuge, and it is difficult to see how, as between ship and cargo, the warehousing of the cargo was caused by the mere putting into port. The defendants have admitted their liability to bear the charge in full. In my opinion there is no reason to treat the warehousing in the present case as other than a charge on cargo.

Reloading.

"We come next to the reloading. Reloading is not an act of sacrifice, for long before it occurs both ship and cargo are safe. Is it then caused by any act of sacrifice, or is it part of the loss, in other words, which an antecedent act of sacrifice involves? Where, for example, a ship has cut away a mast and has put into port to repair the damage so caused, and been compelled, in order to repair this special damage, to unload and to reload the cargo, it may follow, according to the decision in *Atwood v. Sellar* (q), that such expenses are all part of the loss involved in the original sacrifice. But in the present instance the only sacrifice has been the putting into port, and the reloading expenses are not part of the loss which putting into port has caused, but a loss caused by the captain's decision to repair his ship and to unload and reload the cargo for that purpose (r). The charges of reloading in such a case ought in principle to fall upon the freight, or else upon the freight and the ship together if the two interests are severed.

Not caused by putting into port.

Charges of proceeding to sea.

"I come next to the charges outward, and this seems to me to raise a more difficult question. Expenditure of this description is not in itself a general average sacrifice, but may it not be said that it has been caused by one, on the ground that a ship which goes into port will have to come out again, and that the former operation directly causes the latter? If strict theory is to be applied, there

(q) 4 Q. B. D. 342; 5 Q. B. D. 286.

(r) This apparently implies the rejection of the theory maintained at so much length by Cockburn, C. J.,

that the shipowner is bound, if he can, to repair his ship and complete his contract. (See *post*, pp. 272—275, n. (u).)

might seem to be a difference between the cases in which the vessel has done nothing in the port of refuge between availing herself of a temporary shelter, and the cases where she puts in in order to repair damage, and because it was not safe for her to continue her voyage without such repairs. In the former case, where shelter alone is sought, the vessel might plausibly be said to come out, because she previously went in. In the latter case, where she puts in for repairs, the proximate cause of her coming out is not that she put in—for she could not have resumed her voyage had not the necessary repairs been effected upon her while in harbour—but that the master when in harbour decided, in the discharge of his duty and in the interest of his owners, on repairing the ship, reloading the cargo, and carrying on the voyage. The outward expenses ought, therefore, as it seems to me, in the present instance, to fall on freight” (s).

Outward charges sometimes general average.

Aliter, if ship repaired.

Proceeding in the next place to consider the authorities, the learned judge arrived at the conclusion that they were none of them inconsistent with the conclusion he had arrived at.

Baggallay, L. J., dissented from both his learned brethren. He rested his argument exclusively on the ground that the decision in *Atwood v. Sellar*, which he considered to be right, obliged them in consistency to decide the present case in the same way. When it was conceded that the going into port to repair was an act of sacrifice for the common good, the expenses of discharging cargo in order to repair, and of warehousing and reloading it, and putting to sea again, were just as much, or just as little, parts or consequences of the going in, whether the original inducement to go in had been a sacrifice or an accident. “In each case the putting into port *for the safety of ship and cargo* was an act of sacrifice, giving rise to claims for general average contribution; in the case of A. this act of sacrifice followed, or was a

Baggallay, L. J.

(s) *Svensden v. Wallace* (1884), 13 Q. B. D. 69, at p. 86.

continuation of, the original act of sacrifice, whilst in the case of B. it was itself the original act of sacrifice; in each case the proximate cause of the extraordinary expenses incurred was the putting into the port of refuge" (*t*).

*Sveendsen v.
Wallace* in
House of
Lords.

The case was carried up to the House of Lords. There judgment was given by Lords Blackburn, Watson, and Fitzgerald (*u*). Their lordships confirmed the decision of the majority of the Court of Appeal.

*Lord Black-
burn.*
Reconsidera-
tion of facts.

Lord Blackburn began his judgment by setting forth the facts, and in doing so took the opportunity of pointing out that it had been up to that point taken for granted, in the arguments on both sides, and in all the judgments, that the cargo was discharged in order to repair the ship, whereas the documents showed that *The Olaf Trygvason's* cargo was discharged for its own preservation. This fact, the learned Law Lord considered, was material, and one which their lordships ought to have power to determine in some manner, "unless," he said, "it could be laid down as a general proposition of law, either that no expenses of warehousing the cargo and afterwards re-shipping it in a port of refuge can ever be general average expenses, or that they must always be so. I am not prepared to assent to either proposition. Any state may, by its legislature, enact that within its territories the law shall be either way. Judging merely from the language of their codes (which, however, is often apt to mislead, unless construed with reference to their law and usage), I should say that some foreign nations have enacted in opposite ways. There is, however, no English enactment on the subject." The learned Law Lord, therefore, proposed to deal with this case as if a power were given him to look at the ship's papers and, if he should think fit, draw inferences from them as an average adjuster would do. The learned lord then dealt with the case of *Simonds v. White* (*x*), and, diverging to the question of custom, which was not strictly before the court, said that in *Wilson v. Bank of Victoria* (*y*), it was intimated that a custom tacitly making it part of the contract that any particular principle should be applied might alter the whole. "I think," he

(*t*) *Sveendsen v. Wallace* (1884), 13
Q. B. D. 69, at p. 82.
(*u*) (1885), 10 App. Cas. 404.

(*x*) (1824), 2 B. & C. 811.
(*y*) (1867), L. R. 2 Q. B. 203.

said, "that unless it was proved that there was such a custom as to be tacitly incorporated, it could have no such effect. And I have no doubt that the issue, which has not been brought here by appeal, was rightly decided. I think, however, there is much force in the concluding observations of Manisty, J., in *Atwood v. Sellar* (z). I agree with him, at least thus far, that a general practice, long continued amongst English adjusters, affords strong ground for thinking that the practice is one which is not, in general, inconvenient, and that it throws a considerable onus on those who impugn it to show that the particular circumstances are such as to render an adherence to the practice in that case against principle."

Observations
on practice
of adjusters.

The learned Law Lord, who certainly had made himself more familiar with the figures of the case than any of those who had gone before him, then in a series of calculations proceeded to point out that the defendants, having paid into court a sum based on their liability, according to an adjustment which had charged the charterers with a part of the cost of reloading in proportion to the part of freight prepaid, had to that extent paid too much. "If the 450*l.*, which is the cost of reshipping, is properly charged to freight, the defendants are not liable to pay any portion of it." The defendants having thus paid too much, and by a larger amount than the whole sum in dispute affected by the outward pilotage and port charges, the learned judge concluded it was unnecessary for him to consider the question of liability for these items.

That too
much had
been paid into
court.

Up to this point not a word had been said bearing on the merits of the question of principle before the court. From this point it will, perhaps, be more satisfactory if I give the judgment verbatim as it is reported:—

"I do not think it necessary to inquire what would be the proper course if the seeking the port of refuge had been solely for the purpose of doing repairs, the cargo not being in any danger. Such a case may perhaps sometimes, though rarely, occur. Nor do I think it necessary to inquire what would be the proper course if the ship and cargo were both safe in the harbour of refuge, and the unloading of the cargo was entirely for the purpose of facilitating the repairs. Such a case seems more likely to happen than that first supposed. I think, on examining the two adjustments, and exercising the power which I have assumed to be given, there can be no doubt that the cargo on board the ship, leaking to the

Question at
issue.

Reloading
chargeable
to freight.

extent which she did, was not safe even in harbour until the ship was so far lightened that she could be taken into dry dock. Should the expense of reloading her, after the repairs were made, be charged to freight, the goods having been taken out under such circumstances? I think it should (a).

"I am afraid I have not understood the reasoning on which Cockburn, C. J., in his judgment in *Atwood v. Sellar* (b), comes to a contrary conclusion. If I have, I must express dissent from it.

"The ordinary contract between shipowner and merchant is that the goods shall be carried to their destination, and shall there be delivered, unless prevented by the excepted perils. And this generally should be done in the original ship. Whenever the ship is disabled it must, in order literally to fulfil this contract, be necessary to repair the ship so far as to make her fit to carry on the cargo, and if any part of the cargo has been taken out to reship it.

*Rosetto v.
Gurney.*

"*Rosetto v. Gurney* (c) was a case between the owners of corn insured from Odessa to Liverpool and their underwriters. The plaintiffs claimed for a total loss, and the underwriters paid money into court. The cargo was at Cork in a very damaged state, but by great skill, and at considerable cost, was prevented from turning into manure, and was sold at Cork, a considerable part of it being still corn. The verdict was entered for a total loss. A rule for a new trial was obtained on various grounds; one, on which it was made absolute, was that the judge had not properly directed the jury as to the effect of the extra cost of conveyance in a new bottom from Cork, the port of distress where the wheat was sold, to Liverpool, the port of destination. The court say as to this, 'If the voyage is completed in the original ship, it is completed upon the original contract, and no additional freight is incurred. If the master tranships because the original ship is irreparably damaged, without considering whether he is *bound* to tranship or merely at *liberty* to do so, it is clear that he tranships to earn his full freight; and so the delivery takes place upon the original contract.'

Facts of case
before him
considered.

"There never was in the present case any question as to *The Olaf Trygvason* being irreparably damaged; but she was so far damaged that it was certain there would be some delay (it turned out to be about six weeks) before *The Olaf Trygvason* was in a fit

(a) *A fortiori*, in the second case put by Lord Blackburn, viz., where the unloading is solely for the purpose of repairing particular average

to the ship, the cost of reloading cannot be general average.

(b) (1879), 4 Q. B. D. 334.

(c) (1851), 11 C. B. 167, 188.

state to carry the goods on to Liverpool. And if there had been a good ship at St. Louis willing to carry the goods to their destination for less than the agreed freight from Rangoon, it might have been for the benefit of all that the goods should be shipped on that vessel at once, carried on, and delivered to the consignees without delay. Such was the course pursued in *Shipton v. Thornton* (d), where the original shipment was from Singapore to London in *The James Scott*. She put into Batavia in distress, and there the goods were put into *The Mountaineer* and *The Sesostris*, carried to London, and there delivered to the owner of *The James Scott*, at a cost less than the amount of freight which he would have earned had the goods been carried on in *The James Scott*. He delivered them to the consignee, who produced the original bill of lading by *The James Scott*. The consignee refused to pay freight at the rate in the bill of lading of *The James Scott* from Singapore to London, though he paid that from Batavia agreed on in the bills of lading of *The Mountaineer* and *The Sesostris*. The decision was that, whether or not the captain was bound to tranship, he was at liberty to do so, and having done so had earned his full freight; the expense which he had incurred to earn it being certainly not general average, but I think a particular average paid by the shipowner to earn his freight. My conclusion is, that if, instead of transhipping, the captain waits till the original ship is repaired, and then re-ships in that original ship, the cost of so doing should not be general average, but particular average to earn the full freight. Cockburn, C. J., seems to think that in all cases where the ship is disabled, whether she can be repaired or not, the original contract is dissolved and a new one formed by law. This seems to me in direct conflict with the two decisions I have just cited; and even if it were so, I think it is somewhat in the nature of a *petitio principii* to say that one of the terms of the new contract should be that the cost of transhipment or reshipment, as the case may be, should be general average.

*Shipton v.
Thornton.*

"The judgment, however, of the Court of Appeal, delivered by Thesiger, L. J., does not proceed on this ground. I have some difficulty, after reading the statement as to the grounds on which the Court of Appeal proceeded, in saying on what ground it does proceed.

Effect of
*Atwood v.
Sellar.*

"The special case in *Atwood v. Sellar* (e), was express that the

(d) (1838), 9 A. & E. 314.

(e) (1879), 4 Q. B. D. 342.

ship was injured by a voluntary sacrifice, and was thereby compelled to put into Charleston to repair the said damage. It is not expressly said, either way, whether the cargo was in any danger. Baggallay, L. J., who was a party to that judgment, said that it was decided on the ground that putting into the port of refuge was necessary for the safety of both ship and cargo, and that he, at least, thought that it was immaterial what was the cause of that necessity. Yet I think there is much reason for doubting if Thesiger, L. J., quite agreed in this. He says, 'The principle which underlies the whole law of general average contribution is that the whole loss, immediate and consequential, caused by a sacrifice for the benefit of cargo, ship and freight, should be borne by all. This principle is in the abstract conceded by counsel for the defendants, and its application to the present case is admitted to the extent of allowing the expenses of unloading the goods, for the purpose of doing the necessary repairs to enable it to proceed on the voyage, to be the subject of general average contribution, but they attempt to distinguish such expenses from those of warehousing and reloading the cargo, and of outward port and pilotage charges, by the suggestion that the common danger to the whole adventure is at an end when the goods are unloaded, and that general average ceases at the point of time when the common danger ceases.' This is, I think, a fair statement of the argument of the respondents' counsel in the present case. Afterwards he says, 'The going into port, the unloading, warehousing, and reloading, are at all events parts of one act or operation contemplated, resolved upon, and carried through for the common safety and benefit, and properly to be regarded as continuous.' This was much relied on by the counsel for the respondents. If I thought it was the state of the case before the House, I should consider whether in such a case it might not fairly be argued that the whole of these operations were to be considered as parts of the expense of repairing the damage; and therefore, in a case where the cause of the damage was such that the expense of repairing it ought to be borne by all, as was the case in *Atwood v. Sellar* (f), to be borne by all; but that in a case where the cause of the damage was such that the expense of repairing it ought to be borne by the ship only, which is the present case, to be borne by the ship only. But having come to the conclusion that such is not the state of the case before the House, I do not enter into this inquiry.

"Having come to the conclusion that, under the circumstances of this case, the expenses of reloading, &c. should not be placed to general average, and that being enough, if your lordships agree with me, to show that the respondents have paid more than enough, it is not necessary to consider whether the smaller sum of 20*l.* ought also to have been charged to ship or freight, and not to general average. I agree with Bowen, L. J., in what he says at page 90 (*g*), that that is a more difficult question than the other. And as the amount is not sufficient to turn the scale, it is not necessary to decide it. I should think it seldom involved any sum so great as to be of practical importance, and I prefer leaving it undecided."

No opinion
given as to
outward
port charges.

Lords Watson and Fitzgerald concurred, but gave no reasons.

Conclusion.

§ 49. It only remains to sum up, as briefly as possible, the results of this litigation.

It is, in the first place, to be pointed out, that the action of the House of Lords in abstaining from pronouncing an opinion on some of the questions brought before them, as being difficult, and as representing an amount insufficient to cover an over-payment made by the defendants on a totally different ground, presumably leaves the question, or some part of it, open for reconsideration hereafter. It may be many years, however, before the subject is again touched in the way of litigation. A twofold task, therefore, here lies before us. We are to consider, first, for practical purposes, the action taken by adjusters on the law as it stands; and secondly, what theoretical principle or principles can be extracted from these decisions as likely to govern, more or less, similar cases when again brought before the courts of law.

With regard to the first of these questions, the

Association of Average Adjusters has passed the following resolutions :—

Result of
decisions re-
duced to rules
of practice.

“ That when a ship puts into a port of refuge in consequence of damage which is itself the subject of general average, and sails thence with her original cargo or a part of it, the outward as well as the inward port charges shall be treated as general average ; and when cargo is discharged for the purpose of repairing such damage, the warehouse-rent and reloading of the same shall, as well as the discharge, be treated as general average. (See *Atwood v. Sellar.*) ”

“ That when a ship puts into a port of refuge in consequence of damage which is itself the subject of particular average (or not of general average), and when the cargo has been discharged in consequence of such damage, the inward port charges and the cost of discharging the cargo shall be general average, the warehouse-rent of cargo shall be a particular charge on cargo, and the cost of reloading and outward port charges shall be a particular charge on freight. (See *Svendsen v. Wallace*) ” (*h*).

“ That when the cargo is discharged for the purpose of repairing, re-conditioning, or diminishing damage to ship or cargo which is itself the subject of general average, the cost of storage on it and of reloading it shall be treated as general average, equally with the cost of discharging it.”

(*h*) See also in Appendix Z, No. 20 the incidence of the expenses at the port of refuge is worked out in detail.

“ That no distinction be drawn, in practice, between discharging cargo for the common safety of ship and cargo, and discharging it for the purpose of effecting at an intermediate port or ports of refuge repairs necessary for the prosecution of the voyage.”

“ That whenever the cost of discharging cargo is general average, all loss or damage necessarily arising to cargo therefrom shall be allowed in general average.”

“ That damage necessarily done to cargo by discharging, storing, and reloading it, be treated as general average when, and only when, the cost of those measures respectively is so treated ” (i).

Coming now to the second question above proposed—that which has reference to the permanent results likely to flow from these important decisions—I venture to offer the following observations:—

The Master of the Rolls has given a solution of a difficulty which had heretofore been strongly felt by, I venture to say, every one who had of late years attempted to justify the former custom of Lloyd’s on theoretical principles—an inconsistency which had been pressed upon them by the assailants of that custom with very great effect. How, it used to be asked, can you justify your treating as general average the cost of discharging the cargo, when the ship has gone into port to

(i) See *Hamel v. P. & O. Steam Navigation Co.*, [1908] 2 K. B. 298, where the ship got into difficulties immediately after leaving her berth, and sustained some damage, in consequence of which she returned to her berth, but Lord Alverstone, C. J.,

held that the cargo was at no time in danger, and, therefore, that there was no general average act, and that the cargo-owner was not entitled to contribution for damage done to the cargo, in discharging it to enable the ship to be repaired.

repair accidental damage, and the cargo is discharged not for the common safety, nor, indeed, for the safety either of cargo or ship, but merely because the ship cannot be repaired till the cargo is out of it? How can you justify this except by arguments which contradict, or, at least, hopelessly weaken, the arguments by which you support the remainder of your custom? To this there had, heretofore, been no valid or intelligible reply. Lord Esher has now, for the first time, furnished one. The sacrifice, or general average act, his lordship points out, consists, not simply in going into port, but in "going into port to repair"; and this is an elliptical expression for "going in so as to be in a position which will enable her to be repaired" (*k*). The landing of the cargo, then, in the case supposed, is rightly treated as general average, because it is part of the act of going into port to repair (*k*). This solution of our difficulty is, I venture to think, the true one, and that which will permanently hold its ground, as being proof against assault by reasoning. The cost of discharging is, in this case, not general average on its own merits, but because it forms part of another act; or, more precisely, because it is part of the expense which naturally follows from the general average act, and the incurring of which must, therefore, be taken to have been foreseen when that act was resolved on (*l*).

(*k*) *Ante*, p. 236.

(*l*) *Ante*, § 5. The view that the general average act is "going into port for repairs" has been criticised by Mr. Carver, on the ground that the act of putting into port is only a general average act so far as it is done to secure the common safety, and that if it is done with any further object, then, so far, it is not a general

average act. (Law Quarterly Review, July, 1892.) This criticism seems to agree with the passage in the judgment of Bowen, L. J., in *Svendsen v. Wallace*, cited *ante*, pp. 239, 240, in which he denies that port of refuge expenses following upon a particular average loss can be allowed on the ground that they were contemplated by the captain at the time when he

But, if so, was not the warehousing and reloading of the cargo equally a part of the expense which naturally follows, and must be taken to have been foreseen, when it was resolved to put into port, and in case of need there discharge cargo? It is in a sense left an open question by the courts—certainly by the House of Lords—whether the expenses of bringing the ship out of the port of refuge are not the subject of general average, as being the natural and reasonable result of going into the port with the intention of coming out again. Is not the expense of reloading the cargo, in precisely the same sense, the natural and reasonable result of discharging it in order to repair the ship, with the intention of reloading it when the ship had been repaired? If, then, the cost of discharging, equally with the cost of going into the port of refuge, is rightly admitted into general average, because both are parts of the one act of “going in for repair”; and if the true test for following out consequences of acts which are to be paid for by a third party, whether in tort or as damages, be, as pointed out

put into port. “Intentions,” said the Lord Justice, “which go beyond what is needed for common salvation only show that, in addition to intending that which was a general average sacrifice, it was intended further to do something which was not a general average, nor directly caused by one.” With Mr. Carver’s criticism the editors venture to agree, notwithstanding the great weight that attaches to an opinion of Lord Esher’s, supported by the learned author of this work. Whether the expense of any measure taken after the ship and cargo have been placed in safety is to be contributed for in general average must depend, it is

submitted, on whether the measure is a necessary consequence of some general average act.

In *Hamel v. P. & O. Steam Nav. Co.*, [1908] 2 K. B. 298, Lord Esher’s theory is discussed by Lord Alverstone, C. J., who suggests that the late Master of the Rolls intended to state “the principle that before the unloading can be treated as a general average act it must be part of the act of putting into port for repairs to save the whole adventure from a peril; in other words, there must be a general average act to which the unloading of the cargo and the expenses thereby incurred are necessarily incident.”

by Lord Esher himself in the case of *The Notting Hill* (m), "whether the damage complained of is the natural and reasonable result of the act," it seems to follow that the cost of reloading and taking the ship out of port, in the case supposed, should be treated in the same way as the cost of discharging and taking the ship in.

This, however, is mere speculation, and in the meantime we must act on the law as declared by the courts until or unless the question be again brought before them.

Editors'
summary.

[The only point in relation to port of refuge expenses which the House of Lords decided in *Svendson v. Wallace*, is, as we have seen, that when the ship puts into port to repair particular average damage, and it is necessary for the common safety to unload part of the cargo before doing the repairs, the cost of reloading should be charged to freight. *Atwood v. Sellar* has not been overruled by *Svendson v. Wallace*, although much of the reasoning in the judgments in *Atwood v. Sellar* is opposed to the views expressed in the later case. It may therefore be said that, except on the single point decided by the House of Lords, there is no decision on the incidence of the various expenses consequent on putting into a port of refuge, which must be regarded as final. The questions connected with this vexed subject have given rise to refined arguments, and in discussing them, textwriters have put forward opinions which do not agree in all respects with the existing rules of practice. Thus Mr. Carver thought that in all cases the expenses of leaving the port of refuge should be general average, "since they are the natural and expected consequences of putting in"; also, that the expense of discharging cargo, if only necessary for the

(m) (1884), 9 P. D. 105, at p. 113; *ante*, p. 40.

repair of the ship, should be regarded as part of the cost of the repairs. He also expressed the view that, according to the judgment of the Court of Appeal in *Svendsen v. Wallace*, the expenses of warehousing should always be charged to the cargo, though he said that if the repairs are general average, the warehousing charges should perhaps be regarded as a general average loss of the cargo-owners (*n*). Again, the editors of the latest editions of Arnould on Insurance, agree with Mr. Carver as to the expenses of discharging the cargo, and they think that the expenses of reloading and coming out of port should in general be charged to freight (*o*). Meanwhile, unless the parties have agreed to be bound by the York-Antwerp Rules, average adjusters have now for more than twenty years followed the Rules of Practice founded on the final results of *Atwood v. Sellar* and *Svendsen v. Wallace*; and this circumstance might well be considered a sufficient reason for not disturbing the existing practice, if hereafter it were challenged (*p*).]

Div. II.—*Application to details.*

§ 50. The two decisions of *Atwood v. Sellar* and *Svendsen v. Wallace*, laying down different modes of treatment for port of refuge expenses, according as the damage to repair which the ship goes in is the subject of general or particular average, raise a new and difficult question, viz. how are we to treat those mixed cases in which the damage to the ship is partly general and partly particular average; as, for instance, where the ship is driven in by an aggregate of damage, partly of

(*n*) See Carver, §§ 404, 408, 413.

(*o*) 2 Arnould, §§ 958, 959, 962.

(*p*) See the remarks of Lord Blackburn in *Svendsen v. Wallace*, *ante*, p. 245.

one kind, partly the other, neither of which parts would singly be enough to render the ship unseaworthy, though both together would have that effect?

The point to be determined, in such a case, is, whether the damage by accident, or the damage by sacrifice, is to be treated as the true cause, or *causa causans*, of the resolution to put into the port of distress. For determining this we have as yet no judicial materials: for this is the first and only case in which we are required to go behind the general average act, or sacrifice itself, so far as to analyse the causes which led up to it. In the case of jettison, for example, we confine our attention to the sacrifice itself, without inquiring whether the leak, or other cause in the background which rendered the jettison necessary, arose from some accident primarily affecting the ship alone, or from a storm which, without doing any special damage to the ship, rendered the position of both ship and cargo perilous. So also it would be natural to say that in the comparatively frequent example of mixed cases of this nature, where first there is a sacrifice, such as the cutting away of a mast, and the master, notwithstanding, continues his voyage, after which a second storm arises, and the ship then springs a leak, and thereupon the master bears up for a port of refuge, no matter whether on account of the leak by itself, or because of the leak as affecting a dismasted ship, so that the two injuries combinedly render the ship unseaworthy,—it would be natural to say that, as being the proximate cause, the leak, and not the cutting away of the mast, must be taken to be the cause of putting into port. This, however, we cannot now always say; for it by no means follows in all such cases that the damage which comes later in date is the true *causa causans* of the resolution to put into

port. On the whole, then, it seems prudent to abstain from expressing an opinion.

§ 51. What is the precise point at which the general average is to cease, on the ground that a state of safety has been attained? What is to be considered as a state of safety?

At what point
safety is
attained.

Even in the pursuit of safety, the master is not at liberty wholly to neglect his ulterior purpose of completing the voyage. Supposing there are two ports of refuge which he has to choose between, the first nearer and cheaper to enter, so far as regards the mere cost of going in, than the second, but the first a place at which the ship cannot be repaired, while at the second she can; the second is that which he ought, if practicable, to select. Were he not to do so, he might be even committing a deviation. He is bound to pursue the direct course of his voyage, unless driven from it by necessity; in which case, he must depart from it no further than is requisite in order that he may resume his voyage with safety. The liberty thus given to depart from the direct course, is really given only as a means towards eventually completing his voyage. He is bound so to shape his course towards the place of destination as to obtain that combination of directness, dispatch, and safety, which on the whole is best adapted to the completion of his undertaking. Hence, if he carries the ship to a place where she cannot be repaired, when he might with prudence have gone to a place where she could, he has not performed his duty.

As a rule, then, the "place of safety" to which the master may take the ship at the charge of the general average, is, the nearest port at which she can be repaired. The term "nearest" must be understood not with refer-

ence to mere mileage; it is that port which, on the whole, in the actual circumstances of the ship, is the fittest place for repairing; convenience and cheapness being fairly balanced against the advantages of mere nearness (*q*).

Cost of towing
to a place
where ship
can be re-
paired.

It sometimes happens that such a port can only be reached in two stages. The ship may have to be brought to anchor in a sheltered roadstead, in order to wait for a steamer to tow her to the repairing port. In this roadstead she may be in a sort of temporary safety; she might even lie there for ever without danger. Still, as this is a place which the captain would not be even justified in going to, except as a step towards entering a proper harbour for repairing; and as, consequently, the entering the roadstead can only be regarded as one part of a larger entire operation, the general average ought not to be, and in practice is not, stopped when the ship has reached the roadstead. The cost of towing the ship from the roadstead to the port is admitted into general average.

Expenses
after reaching
the port of
refuge.

When the port of refuge at which the ship is to be repaired has been reached, it is not always the case that the ship and cargo are at that moment in safety. The ship may be leaky, and may require pumping to keep her afloat. The cost of labourers hired for this purpose, while the cargo remains on board, is properly admitted into general average (*r*).

Labourers
hired to
pump.

Discharging
on account of
damage to the
cargo.

This principle leads to the conclusion that, whether the cargo be discharged to avoid a common danger, or to repair the ship, or merely because the cargo itself is sea-damaged and would not be fit to be carried forward unless dried (*s*), the cost of discharging it, this being

(*q*) See *Phelps v. Hill*, [1891] 1 219.
Q. B. 605 (C. A.).

(*s*) But see the judgment of Brett,
M. R., in *Svendsen v. Wallace*, *ante*,

(*r*) *Birkley v. Presgrave*, 1 East,

necessary in order to sever a connection between ship and cargo which under the circumstances renders them both valueless for the time, must in all these cases be treated as a general average (*t*).

§ 52. With regard to the discharging of the cargo, Discharging cargo. it is hardly necessary to add anything to what has been already set down. No question arises if it is discharged for the common safety. If it is discharged merely because, while it is on board, the repair to the ship, to effect which the ship put into the port of distress, cannot be effected, the cost of this has always been, and according to both the latest decisions has rightly been, made the subject of general average; the only intelligible explanation of which, on the principles contended for by the defendants in *Scendsen v. Wallace*, as above pointed out (*u*), is that given by Lord Esher, viz., that the act of bearing up to repair is not yet complete, because the ship has not yet been brought into a situation in which she can be repaired (*x*).

pp. 235, 236, where he states that the cost of discharging cargo merely for its own safety should not be allowed as general average. See also the remarks of Mr. Lowndes in the following section (No. 52).

(*t*) This "deadlock" theory was noticed and condemned by Bowen, L. J., in *Scendsen v. Wallace*, *ante*, p. 241. It seems also opposed to the judgment of Lord Alverstone, C. J., in *Hamel v. P. & O. Steam Nav. Co.*, [1908] 2 K. B. 298, in which his lordship says (p. 305): "If the consequence of a peril of the sea is merely to render one part of the adventure abortive—merely to render the ship unfit to proceed, or the cargo unfit to be carried further

on the voyage—acts done merely to make the ship fit to proceed, or done merely to make the cargo fit to be carried further on the voyage, are not general average acts, and do not afford ground for a general average contribution."

(*u*) *Ante*, p. 236.

(*x*) If Lord Esher's theory, which is discussed *ante*, pp. 251, 252, is wrong, one may be driven, where the repairs are not general average, to support the practice, on the ground that, as Bowen, L. J., says (*ante*, p. 240), it has become inveterate, and is found to be adequate. Theoretically Bowen, L. J., considers it unsound. Similarly, Mr. Carver considers that the discharge is an incident of the repairs,

Discharging
on account of
damage to
cargo.

When cargo is discharged, neither to avert danger either actually or presumably common to ship and cargo, nor in order to repair the ship and by so doing render it possible to continue the voyage, but for the exclusive benefit of the cargo or some part of it, *e.g.*, when cargo has been wetted by sea-water, and must be landed in order to be opened out and dried, there is no settled practice to treat the cost of discharging it as general average; and though I have known cases in which this has been done, and even justified on the ground that there is no connection between port of refuge charges and reasoning—*i.e.*, to use the words of Blackburn, J., all this is “a sort of rule of thumb, which, however, you would not disturb”—yet the better opinion appears to be that in such a case the entire expense, the cost of discharging and reloading, equally with that of opening and drying, should be treated as a special charge on the goods themselves(*y*). This, however, can only be laid down with a degree of diffidence. It may with some force be argued that, since the shipowner is indirectly interested in the discharging, he being bound to use due care in drying the goods when damaged, and being liable in damages if he neglects to do so(*z*), he ought to contribute towards the discharging(*a*); and being even solely

so that the cost thereof should be borne in the same way as the cost of the repairs. (Carver, § 408.)

(*y*) See per Brett, M. R., in *Svensden v. Wallace*, *ante*, pp. 235, 236; per Lord Alverstone in *Hamel v. P. & O. Steam Nav. Co.*, *ante*, p. 239, n. (*t*).

(*z*) *Notara v. Henderson* (1870-2), L. R. 5 Q. B. 346; 7 Q. B. 225.

(*a*) It does not seem to the editors a proper deduction from the fact that the shipowner owes a duty to the cargo-owner to take care of

the cargo, that he ought to bear any part of the expense of preserving the cargo. According to the argument in the text, when the master in the performance of his duty has put into a port of refuge to have damaged goods re-conditioned, the shipowner ought always to contribute to the expense of re-conditioning. Yet, as is clearly stated in *Notara v. Henderson*, *supra*, this expense falls on the cargo.

interested in earning the freight, ought, under the head of a special charge on freight, to pay the entire cost of reloading.

§ 53. When the freight, whether wholly or in part, has been absolutely prepaid by the shipper, it has for some time been the practice in this country to charge the prepaid freight, in other words, the owner of the cargo, with the whole or a proportionate part, as the case may be, of the cost of reloading the cargo and of the outward pilotage and port charges. These charges are treated as applicable to the freight, in such a manner that whoever would in fact lose the freight were the voyage not completed must bear the burden of these expenses.

This practice appears to me to be wholly indefensible on any rational ground. It grew up out of an opinion or fancy, which since the case of *Allison v. The Bristol Marine Insurance Co.* (b) must be abandoned as untenable, namely, that prepaid freight must in all its incidents be put on the same footing as freight, that is, at the shipowner's risk. If the expenses in question are not to be treated as general average, they must fall on that one of the contracting parties whose duty it is to reload the cargo and proceed on the voyage. This is the duty of the shipowner. So long as the ship is able to complete the voyage, and the cargo is fit to be carried on, it cannot be said that the "accidents of navigation" prevent the performance of the contract: and the shipowner's obligation to go on cannot be affected by the circumstance of his having been paid for that service in advance. Our old practice must no doubt be abandoned so soon as it is seriously challenged (c).

Treatment of reloading charges when freight is paid in advance.

(b) (1876), 1 App. Cas. 209.

(c) This was written before the

Reloading is
sometimes
general
average.

§ 54. There are cases in which the cost of reloading the cargo is in practice admitted into general average. If, for example, a ship is stranded, and, to float her, a portion of the cargo is placed in lighters, which lie alongside or remain by the ship, and when she floats the cargo is at once put back, here the whole lighter-hire, together with the cost of putting the cargo out of the ship and back, is, properly, treated as general average. In such a case the whole thing is one entire operation, and there has been no actual severance of the cargo from the ship.

Substituted
expenses.

§ 55. We come now to a class of expenses in a port of refuge which are in practice dealt with as “substituted expenses”: that is to say, which are dealt with, not by inquiring who is the party benefited by the expense actually incurred, but, in what manner would the expense have fallen, had some other more expensive course been taken instead of that which was in fact adopted.

Before giving a detailed account of our practice with regard to expenditure of this class, it is necessary first to consider how far, and within what limits, this practice has a legal standing ground.

decision in *Scendlsen v. Wallace*. Lord Blackburn, in his judgment in that case ((1885), 10 App. Cas. 404, at p. 416, see *ante*, p. 245), takes it for granted that it is simply a mistake to make charterer's prepaid freight pay any part of the cost of reloading; his words being, “If the 450*l.*, which is the cost of reshipping, is properly charged to freight, the defendants [the charterers] are not liable to pay any portion of it.” (See to the same effect, Carver, § 410.)

The rule of the Association of Average Adjusters (No. 20e) on this point is, however, as follows:—

“The expenses referred to in clause (d)” (*viz.*, the cost of reloading the cargo, and the outward port charges) “are charged to the party who runs the risk of freight—that is, wholly to the charterer—if the whole freight has been prepaid; and, if part only, then in the proportion which the part prepaid bears to the whole freight.”

The decisions, bearing on this question, may be arranged under two heads:—

1. Where expenses which would have been recoverable from another person, *e.g.*, from an underwriter, have been avoided by adopting some course which involves a greater loss or a heavier expense to the claimant, but for which that other person is not liable, the latter will nevertheless be held liable up to the amount of the expense which must have been incurred, had such a course not been adopted.

In *Lee v. The Southern Insurance Co.* (*d*), where cargo, which had been landed at a port of refuge, and which, in the opinion of the court on the evidence before them, might have been reloaded and carried on in the ship, was, without the consent of the underwriter on freight, forwarded to its destination by rail, it was held that, although the underwriter on freight was not liable for the entire railway carriage, he was liable for so much as would equal the cost of reloading the cargo in the ship (*e*).

2. The master's right, not only to enter a port of refuge, but to remain and incur expense there, is strictly limited to the necessity of the case. He must not subject the cargo to delay or expense which it is in his power, with safety to all, to prevent. He has not an absolute

(*d*) (1870), L. R. 5 C. P. 397; 39 L. J. (N. S.) C. P. 218.

(*e*) In *Knight v. Faith* (1850), 15 Q. B. 649, where a ship had been sold as a wreck, but because there had been no notice of abandonment, the underwriter was held to be not liable for a total loss, he was yet held liable for a particular average based on the estimated cost of repairing—this being a smaller amount than the owner's actual loss by selling

the ship—notwithstanding that the cost of repairing had not been actually incurred. “If,” said Lord Campbell, “the ship had been fairly sold to be repaired, she must have sold for less on account of the damaged state of her bottom.” (See also *Lidgett v. Secretan* (1871), L. R. 6 C. P. 616; 40 L. J. C. P. 257; *Pitman v. Universal Mar. Ins. Co.* (1882), 9 Q. B. D. 192 (C. A.); Marine Insurance Act, 1906, s. 69.)

right to make a complete repair of the ship at the port of refuge, if a partial or temporary repair will suffice to render her seaworthy to carry the cargo to its destination. Hence, if there be two courses open to him at the port of refuge, by the first of which the ship will be completely repaired, but there will be a long delay or a considerable expense of general average, while by the second this delay or expense will be diminished, and the ship, though incompletely repaired, will be fit to sail on her voyage with her whole cargo, the second course is that which the master is legally bound to adopt. Having done so, he has no right to make a merit of his conduct, and claim compensation from the cargo, on the ground of his having rendered it a service by not having chosen the more expensive course. In such a case, therefore, an adjustment on the basis of "substituted expenses" would be incorrect.

This is expressly determined by the decision in *Wilson v. The Bank of Victoria* (*f*). A dismasted ship, having an auxiliary screw, had gone for refuge to the port of Rio de Janeiro. She might have been completely repaired there, so as to sail home, using her screw as auxiliary only, but such a repair would have involved a very considerable expense, a large part of which would have constituted a general average; while she could be rendered seaworthy to come home, under steam only, by merely making some temporary repairs and laying in a large stock of coal. This course, which was clearly best for all, was adopted. The owner of the ship then claimed that his outlay for the temporary repair and the coal should be treated as a "substituted expense;" that is, should be divided rateably between the saving effected to the general average, and that effected to himself as

(*f*) (1867), L. R. 2 Q. B. 203; 36 L. J. (Q. B.) 89.

shipowner, by not having repaired at Rio. The court decided, however, first, that the employment of the auxiliary screw in the manner described amounted to no more than the using of the ship's own propelling power within the terms of the contract; and, secondly, that, the master being legally bound to adopt this more economical course, there was no right to claim anything as compensation or reward for not having adopted the course which would have been more expensive.

In delivering the judgment of the court, Blackburn, J., said:—

“We wish to guard against being supposed to sanction the notion that in a case like this the shipowners could have charged the owners of the cargo with any part of the expenses of unshipping and warehousing the gold at Rio, supposing the master had under the circumstances adopted that course. Inasmuch as the master could, by the expenditure of a comparatively small sum on temporary repairs and coals, bring the ship and cargo safely home, it was his duty to do so; and, though we do not decide a point which does not arise, we are not to be taken as deciding that his owners would not have been liable to the owners of the cargo if he had not taken this course.

“But, passing by this, we think that the expenses actually incurred must be apportioned according to the facts which actually happened, and that there is no legal principle on which they can be apportioned according to what might have been the facts if a different course had been pursued. No case or authority was cited to support the principle contended for, nor are we aware of any. If in a particular trade it has been found convenient to act on this principle, and that has been done to such an extent as to create a custom, tacitly making it part of the contract that this shall be the principle applied, or if the parties to a charter-party stipulate that it shall be so, and by words of reference to the charter-party in the bills of lading and policy of insurance make it part of the contract affecting everyone, the case would be different; but as it is, the principle proposed is not, we think, tenable at law” (*g*).

These decisions, taken together, indicate the limits within which the method of adjustment as "substituted expenses" must be restricted. *Wilson v. The Bank of Victoria* shows us that this method is not to be adopted, unless there has been something done, not merely involving loss or expense to the shipowner and reduction of expense under the head of general average, but also in excess of the shipowner's duty under his contract. The other cases cited show that when the course taken is in excess of this duty, and when it involves a loss or expense to the shipowner, while it relieves the general average of a charge which otherwise must have fallen upon it, the cargo must not escape from liability altogether, on the plea that the expense actually incurred is not itself properly general average, while the alternative expense, which would have been such, has not actually been incurred. The extent of the cargo's liability in such a case has not yet been judicially determined; but we learn from the judgment just cited that it may be regulated by custom.

We have now to consider, then, to what extent this process of regulating the treatment of substituted expenses by custom has been carried, or is in the process of being carried.

Hire of hulks
or lighters.

1. One such case, as to which the custom is old-established and clearly settled, relates to the employment of hulks or lighters as store-ships for the cargo at a port of refuge. When the cargo has to be discharged, it is sometimes found cheaper to leave it in lighters than to send it ashore and place it in a warehouse. The hire of the lighters may cost more than the warehouse rent alone, and more than the cost of sending the cargo ashore alone, yet less than these two expenses together. Hence has arisen the custom of dividing the lighter hire or hulk

hire between the general average, the cargo, and the freight, in the proportions in which these several interests would have paid for the cost of landing, the warehouse rent, and the cost of reshipment, had the ordinary and more expensive course of landing the cargo been adopted (*gg*).

This custom has been carried beyond the legitimate limits of substituted expenses, as defined above. Even in ports where no warehouses are to be had, and where a cargo is on that account necessarily placed in a hulk, as the only course practicable, the same rule [said Mr. Lowndes] of dividing the hulk hire, though the basis of apportionment is then purely fictitious, is adopted.

2. When cargoes, of which the value is small in proportion to the bulk, such as coals, have to be discharged at a port of refuge, it sometimes is, to save expense, arranged between the master and the shipper that the cargo shall be sold from alongside, and a fresh cargo purchased to take its place when the ship is ready for it. In such a case, the loss on the sale and repurchase is treated as substitution for the expenditure saved by the adoption of this course, and is divided in the proportions in which that expenditure would have fallen. This mode of dealing with the loss appears to be perfectly legitimate.

Buying new cargo to save expense on old.

3. Sometimes, again, in order to save this expense of landing and re-shipping a cargo, the master, with the consent of the shippers, hires another vessel to take his cargo from alongside, and carry it direct to its destination. If, having done this, he is obliged to fill up his vessel at a lower rate of freight, this loss of freight, together with the cost of the forwarding vessel, constitutes

Transshipping entire cargo.

(*gg*) See Rules of Practice of the Average Adjusters' Association, No. 20 (f), *post*, App. Z.

a charge which is substituted for the expenses saved by such a measure (*h*). If the substituted charge is greater than the expenses saved, the master must of course bear the difference himself; but, to the extent of the saving, he is held in practice, and rightly so, to be entitled to claim as if the expenses of discharging are incurred. His right so to claim seems to follow from the decision in *Lee v. The Southern Insurance Co. (i)*.

Transshipping
part of cargo.

4. Another case of substituted expenses arises, when the choice lies between landing the entire cargo and making a complete repair of the ship, which will enable her to carry on the whole cargo, or else transshipping, and sending on in another vessel a portion of the cargo, and sailing home unrepaired, or partially repaired, with the remainder. This can be done when the unrepaired ship, though not seaworthy to carry her whole cargo, is capable of sailing if less deeply laden.

This is a case as to which there is at present no clearly-defined custom. It seems to stand on much the same footing as that which may be called case No. 6, and it must be reserved for discussion till we come to the latter.

Temporary
repair to save
general
average
expense.

5. Suppose that, instead of completely repairing at the port of refuge, which will necessitate the discharge of the cargo, the master saves this expense by a temporary repair, which renders the ship fit to sail home

(*h*) The editors submit that the substituted charge is the difference between the cost of the forwarding vessel and the freight which the master earns by filling up the vessel at a lower freight. For instance, let 1,000*l.* be the original freight, 700*l.* the freight of the substituted ship, 500*l.* the freight earned by filling up. The shipowner receives 1,000*l.* + 500*l.*, and he disburses 700*l.* He therefore receives the net sum of

800*l.* instead of 1,000*l.* Therefore his loss, *i.e.*, 200*l.*, is the substituted charge.

If Mr. Lowndes' rule be literally applied, the calculation will be as follows:—The loss of freight through filling up at a lower freight is 1,000*l.* – 500*l.* = 500*l.* Therefore the substituted charge is 500*l.* + 700*l.*, *i.e.*, 1,200*l.*!

(*i*) (1870), L. R. 5 C. P. 397, *ante*, p. 263.

with all her cargo, but is of no permanent value to her. Can the cost of this temporary repair be treated as a substituted expense, and charged, wholly or in part, to general average?

This is a very old question. It was apparently decided in the negative in the old Roman law (*k*). In modern times, previously to the decision in *Wilson v. The Bank of Victoria* (*l*), there has been a tendency to look with favour on such claims. But that decision must now be regarded as finally putting an end to them. There is no real alternative in such a case: if the ship can be made seaworthy to sail, without extraneous assistance, with all her cargo, by adopting this cheaper course, the master has no right to adopt one that is more costly.

If, indeed, the ship can only be made seaworthy for this purpose by being supplied with something which does not fall within the shipowner's contract,—for example, if it is necessary to put on board extra hands to work the pumps,—this additional assistance must be treated either as a substituted expense or as general average.

6. This leads us to the sixth case, which is one of frequent occurrence, and great practical importance.

Towing ship to destination in place of repairing.

Suppose a ship is at a port of refuge, at which she can be completely repaired. She is not seaworthy to sail from that port, unless so repaired: but she can be safely towed from that port to her place of destination by a steamer. If this course is adopted, who is to pay for the steamer?

Let us further suppose that the cost of the steamer is a larger sum than the saving in the cost of discharging

(*k*) Leg. Rhod. de Jact. (lib. 14, tit. 2, fr. 6, 1 Pardessus, 108). See Appendix A., sect. 7, *infra*.
(*l*) *Ante*, p. 264.

cargo and other general average expenses in the port of refuge, and also larger than the saving to the shipowner from having his repairs effected at home instead of at the port of refuge; but not larger than these two economies combined.

In such a case there seems no escape from the method of adjustment by "substituted expenses." Is the whole cost of the tug to be treated as general average? The owner of the cargo will object, that he would rather let the ship be repaired on the spot. The master, having once gone into port for the purpose of repairing, has no right, he would say, unnecessarily to change that purpose to his detriment. The cost of towing in such a case is not an expense necessarily incurred for the common safety: the ship was already in safety, and it was not necessary that she should be towed. Is, then, the whole cost to fall on the shipowner? That the shipowner might as fairly object to: for the change of plan, by towing instead of repairing, was on the whole judicious, and the expenditure, taken altogether, was reduced by it.

Some equitable division must be made, then, of the cost of towage; and the fairest basis for it seems to be, that each interest concerned should pay its share, in the proportions of the saving effected to each by towing instead of discharging cargo and repairing at the port of refuge.

A custom, however, it appears, is requisite, in order to sanction this mode of treatment. [Such a custom, Mr. Lowndes said, was in the process of formation at the time when the last edition of this work was published.] The advantage resulting from the employment of tugs on such occasions is so obvious, that underwriters, when consulted before the tug is hired, are always ready to encourage the adoption of this course by agreeing to

pay an equitable share of the expense. It is a serious inconvenience to be obliged to make bargains of this nature in each particular case: and this inconvenience seems to be leading to the establishment of a general understanding, which will in time acquire the binding force of a custom, that the cost of towing a disabled ship from a port of refuge is to be apportioned on the basis here indicated.

It may indeed be doubted whether such a custom does not already actually exist (*m*).

(*m*) The following rules of practice have been laid down by the Average Adjusters' Association:—

“That if a ship be in a port of refuge at which it is practicable to repair her, and if, in order to save expense, she be towed thence to some other port, then the extra cost of such towage shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.”

“That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on the whole cargo, but, in order to save expense, the cargo, or a portion of it, be transhipped by another vessel, or otherwise forwarded, then the cost of such transhipment (up to the amount of expense saved) shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.”

“That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on the whole cargo, or such portion of it as is fit to be carried on, but, in order to save expense, the cargo, or a portion of it, be, with the consent of the owners of such cargo, sold at the port of refuge, then the loss by sale including loss of freight

on cargo so sold (up to the amount of expense saved) shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure: provided always that the amount so divided shall in no case exceed the cost of transhipment and/or forwarding referred to in the preceding rule of the Association.”

These rules are still in force and acted on, as is likewise a resolution interpretative of the rule respecting substituted expenses, passed in 1877 and confirmed in 1878, in order to exclude what was found or thought too vague and disputable in its conditions, viz. :—

“That for the purpose of avoiding any misinterpretation of the resolution relating to the apportionment of substituted expenses, it is declared that the saving of expense therein mentioned is limited to a saving or reduction of the actual outlay, including the crew's wages and provisions, if any, which would have been incurred at the port of refuge, if the vessel had been repaired there, and does not include supposed losses or expenses, such as interest, loss of market, demurrage, or assumed damage by discharging.”

Effect of condemnation of ship at port of refuge.

§ 56. Up to this point, we have dealt with those expenses at a port of refuge which are incurred when the ship is made ready, at that port, to prosecute her voyage. We have now to consider those which are incurred, when the ship is condemned at such a port as not being worth repairing.

What justifies condemnation.

According to English law, if a ship is so damaged by sea peril that, although it be possible to repair her, the cost of the repairs necessary to enable her to complete the voyage would be so great that it would be unreasonable to expect the shipowner to incur it, the owner is not bound to repair her. In such a case, his undertaking to carry the cargo to its destination is terminated by one of the accidents of navigation expressly excepted in the bill of lading (*n*).

(*n*) *Assicurazioni Generale v. S.S. Bessie Morris Co.*, [1892] 2 Q. B. 652 (C. A.). Mr. Lowndes, citing *Moss v. Smith* (1850), 9 C. B. 91, laid down the rule that the owner is not bound to repair, if "the repair will cost more than the ship when repaired, together with the freight she will earn will be actually worth." Neither *Moss v. Smith*, however, nor the judgment of the Court of Appeal in *Assicurazioni Generale v. S.S. Bessie Morris Co.*, justifies a hard-and-fast rule, which implies that the shipowner is bound to repair, if the value of the ship when repaired and the freight to be earned will together exceed the cost of the repairs. *Moss v. Smith* was an action against an underwriter on freight, in which it was contended that the assured could claim for a total loss of freight if the cost of repairing the ship exceeded the freight; and it became necessary to discuss the extent of the shipowner's obligation to repair, as be-

tween himself and the owner of the goods. Cresswell, J., in giving judgment, said:—"The shipowner's contract to carry the cargo would be absolute, but for the exception introduced into the bill of lading,—unless prevented by perils of the sea. Now, when is the shipowner said to be prevented by perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary: if that were so, any, the most inconsiderable damage, such as the loss of her rudder, without which she could not proceed, would render her incapable of fulfilling the contract contained in the bill of lading. But, if a ship sustains so much sea damage that she cannot be repaired, so as to be rendered competent to continue the

When the ship has been thus lawfully condemned, the position of the owner of a ship under the British flag

Rule for
English ships.

adventure, then the owner is prevented by a peril of the sea from fulfilling his contract." (9 C. B. pp. 105-106.)

The meaning of the term "cannot be repaired" is explained by the same learned judge, and also by Maule, J., to refer not to an absolute, but also to a pecuniary impossibility. "In matters of business," said Maule, J., "a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling, when he has dropped it into deep water; though it might be possible, by some very expensive contrivance, to recover it. So, if a ship sustains such extensive damage, that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay, the ship is said to be totally lost." (Ib. p. 108.)

Wilde, C. J., said:—"We are asked, Would any man in his senses spend 1,000*l.* upon the repairs of a ship for the mere purpose of earning 500*l.* freight? To this I answer, Certainly not; but this is not the true question. If, by expending 1,000*l.* upon the repairs, he gets, not only 500*l.* freight, but also a ship worth 3,000*l.*, who will for a moment question the prudence of the outlay?" (Ib. p. 108.)

Some dicta in more recent cases might be cited as throwing doubt on the rule laid down in *Moss v. Smith*. In *Worms v. Storey*, Parke, B., said:—"If the vessel sails in a seaworthy state, and in the course of

the voyage is damaged by perils of the sea, *the owner is not bound to repair it*, but if he does not choose to repair, he ought not to go to sea with the ship in an unseaworthy state, and so cause a loss of the cargo: he ought either to repair or stop." ((1855), 11 Exch. 427.) And Willes, J., in referring to this judgment in *Blasco v. Fletcher* ((1863), 14 C. B. (N. S.) 147, see p. 157), and again in *De Cuadra v. Swanu* ((1864), 16 C. B. (N. S.) 795), appears to incline towards the opinion that, if the ship was seaworthy at starting, and has been rendered unseaworthy by sea peril, the owner is under no obligation towards the freighter to incur expense in repairing. It is conceived, however, that these expressions of opinion, when taken in conjunction with the decision of *Moss v. Smith*, can only be regarded as confirmations of the doctrine that the shipowner is not under an absolute obligation to repair at any cost. In confirmation of this, see a remark of Brett, J., in *Macro v. Ocean Marine Insurance Co.* (1874), L. R. 9 C. P. at p. 601.

This subject has been further discussed in the cases of *Atwood v. Sellar*, and *Srensdén v. Wallace*. See, on the one hand, the dicta of Cockburn, C. J., in the former case ((1879), 4 Q. B. D. 342, at p. 358); see *ante*, p. 224; and Lord Blackburn's observations on the subject in *Srensdén v. Wallace* ((1885), 10 App. Cas. 404, at p. 417; *ante*, p. 247).

In *Assicurazioni Generale v. S.S. Bessie Morris Co.*, [1892] 1 Q. B. 571, damages were claimed by the charterers of the ship against her owners for abandoning the voyage

is as follows: He has the privilege of hiring another vessel, and forwarding the cargo in it to its destination,

at an intermediate port after she had sustained damage, although she was in fact repaired; and Collins, J., delivered a judgment in which he reviewed all the previous authorities, and held that where a shipowner has agreed by charterparty that his ship shall proceed to a port of discharge and there deliver the cargo unless prevented by the excepted perils, and the ship has to put into a port of refuge for repairs, the shipowner is liable in damages for abandoning the voyage without the consent of the charterer, unless the effect of the excepted perils was either to make it physically impossible to complete the voyage, or so clearly unreasonable as to be impossible in a business point of view. The learned judge seems further to have laid down the rule (p. 579) that no degree of injury short of a constructive total loss will excuse the shipowner from performing the voyage, where the cargo is not perishable and the repairs can be executed in a reasonable time. Apparently, this means a constructive total loss of the ship, estimated on the assumption that the expense of repairs which will establish a constructive total loss is "an expense greater than the value of the ship and freight, when repaired sufficiently to complete the voyage" (p. 578). The judgment of Collins, J., awarding damages to the charterers, was affirmed by the Court of Appeal, [1892] 2 Q. B. 652; but the suggestion that the case was governed by the rules applicable to the question of constructive total loss is not supported by the judgments; and Lord Esher, M. R., said (p. 658):

"The doctrine of constructive total loss can arise only between an underwriter and his assured. There is no underwriter concerned in the present case, and the doctrine of constructive total loss has no application to it."

The duty of the shipowner to the cargo-owner was also considered by Kennedy, J., in *Hansen v. Dunn* (1906). 11 Com. Cas. 100, and the learned judge stated that "where a ship is damaged and obliged to put into an intermediate port for repairs, it is the duty as well as the right of the shipowner, if he can repair his ship without unreasonable sacrifice and within a reasonable time, to repair his ship and carry the goods to their destination."

The legal authorities, therefore, do not afford a precise answer to the question, when would it be unreasonable to require the shipowner to repair his vessel and carry on the goods? It has not been decided that he is always bound to repair when the repairs will cost less than the value of the ship when repaired, together with the freight which she will earn. When the repairs will cost more than such value and freight, it would *prima facie*, no doubt, in general be unreasonable to expect the shipowner to repair the ship. (See *De Cuadra v. Swann* (1864), 11 C. B. (N. S.) 772.)

Mr. Carver argues, however, that if the freight must be taken into consideration, freight paid in advance ought also to be added, on the ground that it would be anomalous to allow the measure of the shipowner's obligation to depend upon whether the freight has been paid in advance or

still acting as carrier under the original contract. If he does this, he must pay the hire of the second vessel, and receive his freight from the owner of the cargo as if the cargo had been carried in his own ship. If the ship-owner cannot forward at a profit, his duty as carrier is at an end: he is not bound, in this capacity, to hire a second vessel at his own expense (*o*). In this latter case, however, the master's duty as custodian of or agent for the cargo may in some cases oblige him to tranship; that is to say, if there are no means of communicating with the owner of the cargo, and if it is necessary for the preservation of the cargo, or clearly desirable in the cargo's interest, that it should be forwarded. But, then, the transshipment in this case being made in virtue of the captain's agency on behalf of the cargo, the freight of the forwarding vessel, with the expenses of loading the cargo on board, are chargeable to the cargo (*p*).

Hence, if the cost of forwarding is less than the original freight, that cost must fall wholly on the ship-owner, who thus earns his freight; if more, it falls

not. "Either, then," he says, "the freight should be brought into the calculation whether it is payable in advance or upon arrival, or else the obligation to repair and proceed should be confined to cases in which the value of the repaired ship will equal the cost of repairing." (Carver, § 303.) If, indeed, the freight already paid ought to be taken into consideration, so also, it may well be argued, ought the shipowner's past disbursements for the voyage. In *De Cuadra v. Swann*, *supra*, there had been an advance of freight, and it was not suggested that the advance ought to be taken into consideration.

(*o*) It has never been definitely decided whether or not the ship-owner is bound to tranship and forward the goods on his own account, if he can do so at a profit (see *Shipton v. Thornton* (1838), 9 Ad. & Ell. 314; per Cockburn, C. J., *Atwood v. Sellar* (1879), 4 Q. B. D. at p. 359), though the law is sometimes stated in terms which indirectly suggest that he may be bound to tranship.

(*p*) *Shipton v. Thornton* (1838), 9 Ad. & Ell. 314; *Gibbs v. Gray* (1857), 2 H. & N. 22; *Mattheus v. Gibbs* (1860), 3 E. & E. 303; *De Cuadra v. Swann* (1864), 16 C. B. (N. S.) 772; *Hansen v. Dunn* (1906), 11 Com. Cas. 100.

wholly [in a proper case] on the owner of the cargo, the shipowner losing his freight.

This is on the assumption that the cargo has been forwarded by the master, without express intervention on the part of the cargo-owner.

The English law, in such a case, gives no freight to the owner by way of compensation for the part of the voyage which his ship has performed; herein differing from the laws of most other maritime states, which allow a freight *pro ratâ itineris peracti*: that is, in the proportion which the distance performed bears to the distance contracted for. Our law requires a complete performance of the contract, either in the original ship or one lawfully substituted for it, before it gives the shipowner any freight whatever (*q*).

If a portion of the freight has been absolutely prepaid, the question on whom the forwarding expenses are to fall will depend on whether these exceed the balance of freight due to the shipowner under his contract. If the owner can make a profit by forwarding, he forwards at his own expense: if not, the cargo is forwarded on

(*q*) *Wierboom v. Chapman* (1844), 13 M. & W. 230. What is here stated is to be taken as applicable only to the case in which the ship is disabled by sea peril.

When there has been a voluntary acceptance of the goods at an intermediate port under circumstances from which it may be inferred that the further carriage of the goods was dispensed with, a contract to pay *pro ratâ* freight may be implied. (See *Osgood v. Greeting* (1810), 2 Camp. 466; *The Solhemsten* (1866), L. R. 1 A. & E. 293; *Metcalf v. The Britannia Ironworks Co.* (1876), 1

Q. B. D. 613; on appeal (1877), 2 Q. B. D. 423. See also *Hopper v. Burness* (1876), 1 C. P. D. 137; *Hill v. Wilson* (1879), 4 C. P. D. 329; *The Industrie*, [1894] P. 58 (C. A.), in which cases *pro ratâ* freight was unsuccessfully claimed on goods sold at a port of distress.

The merchant will be liable to pay the freight in full, although the cargo did not reach its destination, if by his act or default he has prevented the completion of the voyage. (*Cargo ex Galam* (1863), 2 Moo. P. C. (N. S.) 216; cf. *Blasco v. Fletcher* (1863), 14 C. B. (N. S.) 147.)

account of the owners of the cargo, and the balance of freight is lost to the shipowner (*r*).

Such is the rule for ships sailing under the British flag. In the case of foreign-owned ships, it may be necessary to inquire what is the law of the country to which they belong. Rules for foreign ships.

In the case of a ship damaged and taken into an intermediate port, the extent of the master's obligation to repair the ship, or to forward the cargo, and his right to freight, or any portion of it, in the event of his doing neither, are questions which may depend on the law of the country where the ship is owned,—or, as it has been termed, the law of the flag. [The general rule of English law is that the validity and construction of a contract, and the rights and obligations of the parties thereunder, are to be determined by the *lex loci contractus*, *i.e.*, the law of the country where it is made, unless from all the circumstances it may be inferred that the contract should be governed by a different law (*s*). When the contract is made abroad with the master of a foreign ship, it may generally be inferred that the law of the flag was intended to govern the contract (*t*). The question, however, is always one of the intention of the parties. Thus where the ship was German, but the charter-party was made in England in an ordinary English form, and the charterers were English merchants, the Court of Appeal held that the parties had intended

(*r*) It has sometimes been contended that in such a case the forwarding freight and charges should be apportioned rateably between the shipowner and cargo-owner, in the proportion of the prepaid freight and the freight at risk. This, however, is obviously opposed to the principles which should govern the case, and is

not now acted on in practice.

(*s*) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122 (Ex. Ch.); *In re Missouri S.S. Co.* (1889), 42 Ch. D. 321 (C. A.).

(*t*) See *Lloyd v. Guibert*, *supra*; per Brett, L. J., in *The Gaetano and Maria* (1882), 7 P. D. 137, 147 (C. A.); *The Bahia* (1864), Br. & L. 292.

to make an English contract, and that the shipowner was therefore not entitled to any freight on damaged goods properly sold at a port of distress, although by German law he could claim the full freight (*u*). Yet whatever be the law which governs the contract, it seems well established that the master's authority to deal with the cargo in emergencies at a port of distress depends on the law of the flag (*x*).] Moreover, so far as regards incidents of the contract in the port of loading,—for example, questions as to the proper mode of taking on board and stowing the cargo,—the law of the port of loading must prevail. So far as regards those which have reference to the completion of the voyage at the port of destination,—questions as to the delivery of the cargo,—the law of the place of destination should govern (*y*).

(*u*) *The Industrie*, [1894] P. 58. See also *Chartered Mercantile Bank of India v. Netherlands India Steam Nav. Co.* (1883), 10 Q. B. D. 521 (C. A.). In *The Wilhelm Schmidt* (1871), 25 L. T. (N. S.) 34, the law of the place of delivery was held to govern the contract.

(*x*) See *Lloyd v. Guibert*, *supra*; *The Gaetano and Maria*, *supra*; *The August*, [1891] P. 328.

(*y*) *Per cur. Lloyd v. Guibert* (1865), L. R. 1 Q. B. at p. 126. Owing to the frequent necessity of taking the laws of foreign countries into consideration, some account of the laws of most foreign countries on the subjects of transshipment and *pro rata* freight, is given in the Appendices.

A complication may arise, in case the rule of the flag should be, that such questions are to be determined by the law of the port of destination. When that is so, the true way of complying with the law of the flag

may be, to follow some other law; to follow the law of England, if the ship is bound for an English port. This is not an imaginary case. The law of Holland, for example, does not permit a shipowner to abandon his contract with the freighter even when the ship is so damaged as not to be worth repairing: he must in that case, if he will not repair, provide a forwarding vessel at his own expense, even though the cost of it exceeds the original freight. But it is also the rule of the Dutch law that questions of liability for freight are to be governed by the law of the place of destination. When there is a transshipment at an extra rate of freight from a Dutch ship under such circumstances, and when the cargo reaches its English destination and there arises the question who is to pay for the cost of forwarding, *Lloyd v. Guibert* obliges us to look to the law of Holland as our guide; but

As a general rule it may perhaps be stated that, wherever the law of a country gives the right to *pro rata* freight, it does so on the ground of a termination of the contract on the spot; so that, in every such case, the cost of transshipping the cargo, and the forwarding freight, must fall entirely upon the owners of the cargo.

§ 57. There is one subject which remains to be considered, before closing this chapter; namely, the right of the shipowner to recover compensation in general average for the wages and keep of his crew. Wages of crew during delay.

In most countries, when the putting into a port of refuge in order to repair is treated as a general average act, giving a right to compensation, not alone for the bare cost of reaching a place of safety, but for all expenses incident to the remaining there and coming out again, the law recognizes, as one of those expenses, the shipowner's loss from having to pay and feed the crew during this forced suspension of the voyage. In England it is, in practice, not so.

Two reasons are offered for the English rule. The first is, that the general average is terminated so soon as the port of refuge is reached, so that the expenses in question, it is contended, do not really form part of the cost of the general average operation, but of the delay in port in order to repair, which, in the case at least of accidental damage, falls within the shipowner's duty under his contract. This reason does not apply, when the damage which necessitated the bearing up was itself the result of a sacrifice for general safety. The second reason is based on the principle, that, to constitute

the law of Holland sends us back to the English law; so that, apparently, in the case supposed, the extra freight is chargeable to the owner of the cargo.

general average, an expenditure must be extraordinary in its kind, not the mere augmentation of an ordinary expenditure. The services of the crew during the whole voyage are due to the cargo, being, like the use of the ship itself, purchased by the engagement to pay freight. The shipowner must take the chance of a longer or shorter voyage.

The English rule has been sanctioned by a series of decisions in our courts, which, though unsatisfactory enough as regards the reasons on which they are based, having for the most part been given at a time when the subject of general average was little understood, must now, it is presumed, be regarded as of binding authority (z).

(z) The oldest reported decisions on this point are those of *Lateward v. Curling*, in 1776, and *Eden v. Poole*, in 1785 (Park, Ins. 8th edit. pp. 117, 288), both of which were actions brought by the owner of the ship; and, in the former case, Lord Mansfield thought it a sufficient answer to the claim, that the thing insured was merely the body and tackle of the ship, and that such an insurance did not cover the crew's wages, that being a distinct subject-matter. And the like reasoning was used by his lordship and by Buller, J., in *Robertson v. Ewer*, in 1786 (1 Term Rep. 127). "Here," said the latter, "the ship itself was safe; and the court only look to the thing itself which is the subject of insurance; and the wages and provisions are no part of the thing insured." In *Power v. Whitmore* (1815), 4 M. & S. 141, where one item of the claim for general average consisted of the wages of the master and crew during two periods of detention at the port of refuge, the earlier one

for repairs and the later in consequence of bad weather, Lord Ellenborough thus briefly dismissed the claim: "General average must lay its foundation in a sacrifice of a part for the sake of the rest; but here was no sacrifice of any part by the master, but only of his time and patience." So the matter remained until the trial of *De Vaux v. Salvador*, in which case the question was again raised, not directly as one of general average, but in an action against the underwriter on ship; and the immediate point at issue was, whether the wages of the crew, during a detention to repair, could be added to the cost of repairs, to make up the required percentage of a claim. The claim was rejected by Lord Denman on the following grounds: That, though the authority against it rested at first on a mere dictum of Lord Mansfield, yet being the dictum of so great a master of insurance law, having been sanctioned by Mr. Justice Buller, himself a high authority, having been accepted by the text writers, and,

It would certainly have been more satisfactory if we could say that the arguments in favour of the allowance of wages and provisions had been laid before, and at least listened to by, the Judges of the English courts. There is really something to be said in support of a practice which is of great antiquity, and very general amongst seafaring communities.

Let us confine ourselves to the case of a ship which has put into port to repair damage which is itself the subject of general average.

The shipowner contends that he is entitled to an indemnity for his loss of the ship's employment during the detention caused by the sacrifice made for the common safety. If he is entitled to a complete compensation for such loss, this ingredient in it is too important to be left out of sight. His right to compensation for loss of time is recognized by the courts when it is a question of damages under a collision suit. In such a case he receives compensation for it, under the name of demurrage.

But, it may be objected, if the claim is for demurrage, why limit this to the cost of keeping the crew? Why not also bring in the loss of time? The answer is: The

above all, having, although a case of everyday occurrence, passed unquestioned for nearly seventy years, it must now be regarded as fully established, and admitting of no doubt. (*De Pauw v. Salvador* (1836), 4 Ad. & Ell. 420.) So much is there of accident, we may remark, in the formation of law! This important question, in which the law of England differs from that of most other maritime states, has never yet been argued out, even in the most rudimentary manner, in the English courts; and yet it must be regarded,

by the mere lapse of time, as firmly and unquestionably established. It is so treated in 1867 by the court, in *Wilson v. The Bank of Victoria*, Blackburn, J., alluding to the subject incidentally, as a matter settled and well known. (See L. R. 2 Q. B. 203, at p. 212. See, however, *contra*, the passage in the judgment of the Court of Appeal in *Atwood v. Sellar* (1880), 5 Q. B. D. 286, at p. 291; *ante*, p. 228; approved by Barnes, J., in *The Leitrim*, [1902] P. 256, at p. 268.)

shipowner's loss of time is balanced by a corresponding loss on the part of the owners of the cargo. The delay is or may be prejudicial to the latter in two ways: they may lose their market—but against this may be set the chance of a rise in the market during the delay; they also lose the interest, during the delay, on the cost of their merchandise. This loss of interest bears the same proportion to the value of the goods which the shipowner's loss, by being deprived of the use of the ship, bears to the value of the ship. At any rate, if not always precisely the same, these two losses may not unfairly be set off against one another (*a*). If insurance be left out of sight, it makes little or no difference, as between the owners of cargo and the owner of the ship, whether both these losses are brought in, or both left out. But, over and above this loss of time, the shipowner has to bear an additional burden by having to pay and

(*a*) This argument is supported by the decision of Barnes, J., in *The Leitrim*, [1902] P. 256. In that case the ship was let by a time charter, which contained the usual clause providing that the hire should cease in case of damage preventing the working of the vessel for more than twenty-four hours, and the shipowners claimed for a loss of time-freight while the ship was undergoing general average repairs; a practice of average adjusters not to allow such a loss in general average was proved, and the learned judge held that the practice was right. "In cases like the present," said the learned judge, "the loss of time is common to all the parties interested, and all suffer damage by the delay, so that the damages by loss of time may be considered proportionate to the interests, and may be left out of

consideration. Were this otherwise, great inconvenience would arise, and enormous difficulty be found in attempting to ascertain what was the proper amount of loss on each of the numerous interests which go to make up a shipping adventure." Another ground on which the learned judge held that the claim could not be maintained was, that the loss of freight under a time charter caused by delay is the result of an "accidental circumstance" peculiar to the shipowner and the time charterer, and arising out of the contract between them, with which the cargo-owner is not concerned. (See also per Bigham, J., in *Anglo-Argentine Live Stock Agency v. Temperley S.S. Co.*, [1899] 2 Q. B. 403, 412; Scrutton on Charterparties, 6th edit., p. 251.)

maintain his crew, who would be paid off at the end of the voyage. He is not really compensated for the sacrifice which necessitated the delay, unless this outlay is made good to him.

If, then, at any future time the courts should lay down the principle that, when there is a delay caused by a sacrifice, the loss thereby occasioned is to be completely compensated in general average, it may become necessary to reconsider the present rule as to the crew's wages and provisions. It is by no means improbable that in this respect a distinction may be drawn between the case of putting into port to repair accidental damage, and that in which the putting in has been necessitated by a sacrifice for the common safety.

At present, however, we do not seem to be ripe for such a change; the exclusion from general average of the crew's wages, during the delay in the course of a voyage not terminated by wreck, must be taken to be a settled rule (*b*).

The question, however, still remains undetermined in our courts, to what extent there may be a claim for Crew's wages
in case of
shipwreck.

(*b*) In *Anglo-Argentine Live Stock Agency v. Temperley S.S. Co.*, [1899] 2 Q. B. 403, a claim was made for a contribution in respect of the fodder supplied to the plaintiffs' cattle during the ship's stay in a port of refuge to repair damage to the ship. Such a claim seems hardly maintainable under the common law, while contribution for the wages and provisions of the crew is disallowed, and Bigham, J., rejected it on the ground that it was a loss by delay, on which a claim in general average cannot be founded. The learned judge also held that the cost of the fodder was not covered by the words "all storage charges on such cargo" in Rule X. (*c*)

of the York-Antwerp Rules. The cattle had not been landed; and even if they had been, he said that he would have had great difficulty in saying that the cost of the fodder could properly be called storage charges.

An attempt was also made to obtain contribution for the keep, during the stay in port, of the cattlemen employed by the plaintiffs for the voyage, on the ground that they were members of the crew within the meaning of Rule XI. of the York-Antwerp Rules; but this part of the claim also failed. For another part of their claim, on which the plaintiffs succeeded, see *infra*, p. 288.

the wages of the master and crew if these are retained for the general service after the period at which the contract with the crew, as well as the contract to complete the voyage, have been terminated by the wreck or condemnation of the ship.

On principle it seems clear that, when there has come a time at which the owner is at liberty to discharge the master, or the master to discharge his crew, on the ground that their duties are terminated by the permanent incapacity of the ship to continue her voyage, the shipowner's obligation towards the owners of the cargo to retain his crew must terminate likewise. If, therefore, the master or crew are retained beyond that period, they stand really in the same position as labourers who may be hired; and, if they are retained to save the cargo, their wages must be charged against the cargo, precisely as the hire of labourers would have been. The question is, then, what is the period at which the master or the crew may lawfully be thus discharged?

This question must be determined by reference to the following clauses in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60):—

§ 157 (1). "The right to wages shall not depend on the earning of freight; and every seaman and apprentice who would be entitled to demand and recover any wages if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to claim and recover the same, notwithstanding that freight has not been earned; but in all cases of wreck or loss of the ship, proof that the seaman has not exerted himself to the utmost to save the ship, cargo, and stores, shall bar his claim to wages."

§ 158. "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship. . . . he shall be

entitled to wages up to the time of such termination, but not for any further period."

If, then, the service of a seaman is terminated by reason of the ship's wreck—in other words, if the ship's wreck renders it impossible for him to render any further service, either in his proper capacity as a mariner, or in the duty, superimposed by the Act, of saving the ship, cargo, and stores,—his right to wages terminates at the same time, and he at that point of time ceases to be the servant of the shipowner under his articles. This raises two questions:

First, what is that "wreck or loss of the ship" which has this effect?

The term "wreck," in connection with this subject, must no doubt be understood as including all cases of ascertained permanent incapacity of the ship for navigation. Whether the ship is so wrecked as to be broken in pieces, or simply damaged to such an extent as not to be worth repairing, can make no difference, so soon as the hopelessness of her condition has been ascertained. This hopelessness must be ascertained, however, before the crew's services can be regarded as at an end. It could never have been the policy of the law to allow that, so soon as a ship had struck the ground, or otherwise been placed in a situation which might result in wreck, the master should have the right to dismiss the crew, or the crew to dismiss themselves, without waiting to find out whether or no there would be a possibility of saving or repairing her. It is in fact to prevent such a mischief, that the obligation to assist in saving the ship and cargo is imposed upon the crew. Even where their assistance for this latter purpose is not required, it seems plainly reasonable that the master should be obliged to retain

Seamen's contract does not terminate until condemnation of ship.

his crew, until it is known with certainty that the ship is not worth repairing (*c*).

Hence we arrive at the rule, which is adopted in the practice of adjusters, that, in cases of actual or constructive total loss, the master is not at liberty to dismiss the crew until the ship has been properly condemned as irreparable or not worth repairing. The usual form of condemnation is by a survey held by authorized or at least disinterested persons.

Secondly, in case the ship has been condemned, or clearly proved irreparable, while the cargo is still on board or at hazard, is the master *bound*, under § 157 (1) of the Act—or is he merely at liberty, if he pleases—to retain his crew for the purpose of saving the cargo?

The crew are engaged primarily for the purpose of navigating the ship. After this duty is absolutely at an end, it would seem reasonable—apart from express legislation, and apart from considerations of general policy—to hold that the engagement is terminated, and that neither party is any longer bound by it. This view should be adhered to, it is conceived, except so far as we are restrained by positive legislation or express decisions from so doing. It is clear that in such a case the master has the right by statute to insist on retaining the crew, if he requires their assistance to save the cargo and stores. But there is nothing in the Act to show that he is bound to retain them for this purpose, should he not wish to do so. It may be concluded, then, that although he has the right to keep the crew, he is not bound to do

(*c*) In *The Woodhorn* (1891), 92 L. T. Jour. 113, the facts were that the ship took fire and was scuttled. The seamen were landed and sent home. Afterwards the ship was raised and abandoned to her under-

writers. Although the report is not clear on the point, wages were apparently only held to be due to the crew until the time when they were landed.

so. He may discharge them, and hire labourers in their place: and, if he may do this, without being liable to be charged by the owner of the cargo with a breach of his contract, it follows that he may hire these same seamen as labourers, at the cost of those who have to pay for saving the cargo,—that is, either as general average, or as a special charge on the owners of the cargo, according to circumstances (*d*).

(*d*) It may be objected that this view is one-sided as regards the crew, and that these, if bound to remain if required, ought to have the right to insist on remaining, should they wish to earn wages in this manner. But such one-sided arrangements are not unknown to the law. The privilege of a shipowner to forward cargo by another vessel, if he can make a profit by it, while he is not bound to forward unless he pleases (see *ante*, pp. 272–274), is a case in point. So likewise is the right of a master to retain a pilot in a river or roadstead, on payment of a fixed rate per day, while he is not bound to retain him unless he pleases. Viewed as a question of general policy, it is expedient that the master should have the power to keep his crew, in cases of urgency, for the purpose of saving the property. Had he no such power, there would be danger of the crew's leaving him at a moment of distress, or setting up unreasonable demands for salvage; and even, possibly, conniving or assisting at a wrecking of a ship, for the sake of the gain they might thus expect. On the other hand, there is no such argument from policy in favour of giving the crew a right to remain, against the desire of the captain, to work as labourers after their proper duties as mariners are

at an end.

In the case of *The Warrior*, where the crew of a ship which had been wrecked on one of the Canary Islands had been discharged by the master, while the ship was lying on the beach, filled with water, and irrecoverably wrecked, but not broken up, and with her cargo still on board, and the crew were subsequently employed to save the cargo and stores, Dr. Lushington allowed the crew to recover salvage. At the trial, this was resisted on the grounds that the crew were not legally discharged, and that the services rendered by them were no more than they were bound to perform by the ship's articles. But Dr. Lushington in giving judgment in their favour, said that the master had power to discharge the seamen under such circumstances if he honestly thought fit to do so; and although the propriety of his exercising this power in the present case might be doubted, since the master must have known that he was entitled to have the services of the crew to recover as much of the ship and her cargo as could be saved, still, admitting that he had judged wrongly, the crew were not to be affected by the misconduct of the master, and, having been lawfully discharged, it was open to them to work as salvors. (*The Warrior* (1862), Lush. 476.)

Losses other than expenditures consequent on putting into a port of refuge.

[So far, in this chapter, the losses consequent on putting into a port of refuge, for which contribution has been allowed in general average, have been expenditures; but in one recent case a different kind of loss was allowed under unusual circumstances. The facts were that *The Edenbridge* took on board in the River Plate a deck cargo of cattle and sheep for England, under a contract which provided that the vessel should on no account touch at any Brazilian or Continental ports before landing her live stock. Soon after sailing she sprung a leak, and as the water could not be kept down, the master put into Bahia, a Brazilian port, for repairs. The consequence was that, by reason of an Order in Council then in force, the cattle could not be landed in England, and they were taken instead to Antwerp, and realized much lower prices than they would have fetched in England. Mr. Justice Bigham held that the owners of the live stock were entitled to recover in general average the difference in prices, as a loss which was the direct and immediate consequence of the general average act. "The moment the vessel touched the Brazilian port," he said, "the plaintiffs' property was *ipso facto* rendered of less value than it was before, because by that act the plaintiffs were deprived of one of their means, and that the best, of realizing their property" (e).]

(e) *Anglo-Argentine Live Stock Agency v. Temperley S.S. Co.*, [1899] 2 Q. B. 403.

PART II.

ADJUSTMENT OF GENERAL AVERAGE.

CHAPTER VI.

TIME, PLACE, AND STATE OF FACTS WHICH ARE TO REGULATE THE ADJUSTMENT.

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HAVING now set forth in detail the several losses or expenses which are the proper subjects of general average, we come to the mode in which such losses or expenses are to be replaced by contribution.

This subject falls naturally under three heads. We are to consider, first, what is the proper time and place for adjusting a general average; secondly, in what manner the amount to be made good, in respect of each kind of loss or expense, is to be computed; and thirdly, on what property, and after what manner of determining its value, the contribution is to be levied.

In treating each of these three heads, I shall begin by simply setting forth such decisions of the English courts as directly bear upon them, and then proceed to

state what is the existing practice amongst adjusters. By keeping these two things as separate as possible, I shall better enable the reader to judge how much of what we now do rests on authority that must be adhered to, and how much is at present fairly open to discussion, and may, if necessary, be amended.

We begin with the time and place of adjustment; which properly comes first, since this must regulate the other two.

Time and
place of ad-
justment.

§ 58. The determining of the proper time and place for an adjustment is important for two reasons. In the first place, upon this depends the law which must regulate the adjustment; an important question, seeing that the laws of different countries, with respect to general average, differ materially. Secondly, upon this likewise depends, or may depend, the state of facts which is to be taken as the basis of the adjustment. The question, for example, whether contribution is to be levied on the values of the property as existing at the time of the sacrifice, or the values as they may be upon the termination of the adventure, is one that evidently must to some extent depend on the time and place at which the liability for general average is made to attach.

Simonds v.
White.

The first case in which this question came directly before the courts, is that of *Simonds v. White*. An English shipper and owner of cargo, carried from Gibraltar to St. Petersburg under an ordinary bill of lading, had been compelled at St. Petersburg, in order to obtain possession of his goods, to pay a sum of money as contribution towards a general average, resulting from the ship's having been obliged to put into a port of refuge on the voyage. This contribution, it was admitted, was assessed correctly according to the law of

Russia, but amounted to a larger sum than the merchant would have been liable for had the average been adjusted according to English law. The ship was owned in this country: and the merchant sued the shipowner for the amount which he had thus been compelled to pay in excess of his liability under English law. The court pronounced that the shipowner was not liable.

Abbott, C. J., in delivering the judgment of the court, said that there was one point upon which the laws of all maritime states were agreed, namely, that the place at which a general average should be adjusted was the place of the ship's destination or delivery of the cargo. All were agreed, likewise, in holding that the master was not compellable to part with the possession of the goods until the sum contributable by them should be either paid or secured to his satisfaction. This right of lien could of course only be effectually exercised at the termination of the adventure. It being admitted that the average should be adjusted at that place, the learned judge proceeded to point out that, unless it were to be adjusted according to the law in force at that place, great inconveniences would ensue. The cargo might belong, partly to British subjects, partly to foreigners: were there to be as many different adjustments as nationalities? There must be some one rule for all: and that which was known, and could be administered, on the spot, was clearly the most convenient. "The shipper of goods," said his lordship in conclusion, "tacitly, if not expressly, assents to general average as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average he must be understood to assent also to its adjustment at the usual and

When voyage completed, is port of destination.

proper place (*a*); and to all this it seems to us to be only an obvious consequence to add that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made." For these reasons it was determined that, as between the shipowner and the owner of cargo, the adjustment, being admittedly correct according to the law of Russia, must be regarded as final (*b*).

*Lloyd v.
Guibert.*

In *Lloyd v. Guibert*, in the Exchequer Chamber, a case already referred to (*bb*), the court, while laying down that for many purposes the law of the flag must be resorted to, in order to determine the rights under a contract of affreightment, expressly stated that this was not to be the rule for general average. "The adjustment of a general average at the port of discharge, according to the law prevailing there, is binding upon the shipowner and the merchant, as they must be taken to have assented to adjustment being made at the usual

(*a*) In *Wavertree Sailing Ship Co. v. Lore*, [1897] A. C. 373, it was contended, chiefly in reliance on this passage, that the shipowner was bound to have an average statement drawn up by an average adjuster at the port of discharge; but the Privy Council held that a shipowner may make up the statement himself, and is not bound to employ an average adjuster either there or elsewhere. The words "at the usual and proper place," said Lord Herschell in delivering judgment, "do not refer to the preparation of an average statement, but the actual settlement and adjustment of the general average contributions." In this case the shipowners in England instructed a Liverpool firm of average

adjusters to draw up the statement; the port of discharge was Sydney, New South Wales, and there was no allegation that as regards general average the law of Sydney differed from that of England. The action arose out of the refusal of the consignees, who had agreed by an average bond to furnish particulars of the value of the goods delivered, to supply such particulars to the Liverpool firm.

(*b*) *Simonds v. White* (1824), 2 B. & C. 805. See also *Dalglish v. Davidson* (1824), 5 Dowl. & Ry. 6. As to the lien of the master upon the cargo for general average, which is a possessory lien at common law, see *infra*, § 77.

(*bb*) *Ante*, pp. 277, 278.

and proper place, and, as a consequence, according to the law of that place" (c).

§ 59. These decisions, it will be observed, refer only to the case in which the voyage is completed by the ship's arriving with her cargo at the port of destination. If, owing to sea peril, the voyage is broken up, and the ship and cargo finally part company at some intermediate point, a different rule is applicable. This appears from the decision in *Fletcher v. Alexander* (d). Not so, when voyage broken up.

A ship, bound from Liverpool for Calcutta, with a cargo consisting entirely of salt, was stranded on a sandbank near Wexford. To lighten her, a very large portion of the salt was thrown overboard; she was then towed off the bank, and brought back to Liverpool in a leaky state. Of the salt not jettisoned, the greater part was either washed out by sea-water or so damaged as not to be fit for reshipment. The small portion of sound salt which remained was not sufficient even to ballast her, and was not worth carrying on by itself. The charterer refused to furnish a fresh cargo. Under these circumstances the voyage was abandoned. When the ship was repaired, her owner took in a fresh cargo of salt on his own account, and sent it to Calcutta, where it arrived, and was sold at a profit. *Fletcher v. Alexander.*

On these facts, several questions were raised as to the proper mode of adjusting the claim for jettison; most of which may be reserved for a future chapter. At present we are only concerned with the decision so far as it bears on the proper time and place for adjusting the average.

On behalf of the owner of the salt it was contended

(c) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, at p. 126.

(d) (1868), L. R. 3 C. P. 375.

that he was entitled to the sum which the jettisoned salt would have produced had it been carried in the ship to Calcutta: and, since the event proved that in that case it would have been sold at a profit, as the second cargo was, he was entitled to such profit. As a consequence of this contention, it was argued that Calcutta was the proper place, and the date of the ship's arrival there the proper time, for adjusting the general average.

Bovill, C.J., in giving judgment, said that, although in general the port of destination was the proper place for adjusting a general average, yet, when the voyage was broken up, and the adventure brought to an end at some other place, the average should be adjusted there, and by the law which there prevailed. Montague Smith, J., expressed a similar opinion, but more guardedly; limiting it to the case of a breaking up of the adventure at the port of departure (*e*).

What justifies
breaking up
voyage.

§ 60. Upon the question, what properly constitutes a breaking up of the voyage, so as to change the place of adjustment from the port of original destination to that where the voyage is broken up, we have the following decisions:—

Mavro v.
Ocean Mar.
Ins. Co.

In *Mavro v. The Ocean Mar. Ins. Co.* (*f*), where the ship *General Chassé*, chartered at Constantinople to carry a cargo of wheat from Varna to Marseilles, had sailed with her cargo, but on the voyage had met bad weather, been obliged to carry a press of canvas, and sprung a leak, which obliged her, after throwing overboard some of the cargo and ship's materials, to bear up for Constantinople,

(*e*) *Fletcher v. Alexander* (1868),
L. R. 3 C. P. 375. “The authorities
show that where the vessel is obliged
to return to the port of departure,

that is to be taken as the port of
adjustment” (at p. 387).
(*f*) (1874), L. R. 9 C. P. 595.

the cargo as well as the ship was damaged. Surveyors, appointed by the Consular Court, recommended that the cargo should be sold by public auction for the benefit of all concerned, and that the voyage of the vessel should end at Constantinople. Both the owner of the ship and the charterer were present at this survey. This recommendation was not entirely acted upon: a fresh survey was called, on the application of the agent for the underwriters of the cargo, and it being found that one-fifth part only of the cargo was damaged, that portion only was sold, and the remainder was forwarded in another vessel to Marseilles. The necessity for the transhipment, instead of repairing *The General Chassé*, is not very evident on the report: but it appears that the transhipment was agreed to by all the parties interested in the adventure, and was directed by the order of the Consular Court. On these facts the Court of Common Pleas were clearly of opinion that the court at Constantinople must be taken "to have had jurisdiction to make the orders which it did, and which were acquiesced in at the time. The court were also of opinion, upon the facts found in the case, that it must be taken that the voyage was necessarily broken up at Constantinople" (*g*). On this case it is to be observed, however, as pointed out by Lindley, J., in *Hill v. Wilson*, that: "The real question in this case was the true construction of an English policy of insurance containing the words 'general average as per foreign statement;' and the case does not throw much light on any other question" (*h*).

In the case of *Hill v. Wilson* (*i*), *The Virago* sailed *Hill v. Wilson.* from Riga with a general cargo, bound for Hull, and was stranded and injured, but was got off and towed

(*g*) (1868), L. R. 9 C. P. at p. 604. (*i*) (1879), 4 C. P. D. 329.

(*h*) (1879), 4 C. P. D. at p. 333.

into Copenhagen, where the cargo was discharged and the ship was repaired at a large expense. The whole of the goods belonging to the plaintiffs, being damaged, were sold, and admittedly properly sold, at Copenhagen: the ship, with a portion of her original cargo belonging to other shippers, proceeded on her voyage and arrived at Hull. The shipowner claimed that, as between himself and the plaintiff, the voyage ended at Copenhagen, and the general average as between them must be adjusted at, and by the law of Copenhagen, which was more favourable to him than the law of England, as giving him a *pro ratâ* freight and in other respects. The portion of cargo sold at Copenhagen amounted to about seven-eighths of the whole.

Lindley, J., before whom the case was tried, said:—

“I am of opinion that it is incumbent upon the defendants to show that the Danish adjustment is binding upon the plaintiffs; it is incumbent on the defendants to show that the voyage was terminated at Copenhagen by the occurrence of circumstances which necessitated or justified such termination, and, as a consequence, necessitated or justified a general average adjustment at that port.

“Very little information is to be obtained upon the question what circumstances terminate a voyage at an intermediate port, when the ship with part of her goods on board arrives at her original port of discharge. The only cases reported in our own books on this point are *Fletcher v. Alexander* (*k*), and *Mavro v. Ocean Marine*” (*l*). His lordship, after setting forth those cases, continued:

“In this state of the authorities, it is necessary to consider the matter on principle. The duty of the shipowner is to complete the voyage if he can. If owing to perils of the seas he is compelled to put into an intermediate port for repair, his duty is to refit, and carry on such part of the original cargo as is fit to be carried on. If this is done, a policy on the ship for the original voyage will cover a loss sustained after she has been repaired and is sailing

(*k*) (1868), L. R. 3 C. P. 375.

(*l*) (1874), L. R. 9 C. P. 595; 10 C. P. 414.

from the port of repair to her original port of destination; and a policy on her original cargo will still cover so much of such cargo as is being carried in her between the same ports. In a case of this description, the original voyage is not regarded as broken up into two, viz., first into one voyage from the port of sailing to the port of refuge, and secondly into another voyage from such port to the port of destination.

"Again, if the shipowner, being unable to repair his ship, tranships the cargo and sends it home in some other ship, which he may do, still, as between him and the original consignees of the cargo, the original voyage is treated as continuing, in the absence of some agreement to the contrary. This appears from *Shipton v. Thornton* (m), where the freight payable in such cases is discussed. Further, in a case of this description, a policy on the cargo for the original voyage will cover such cargo when transhipped in order to complete such voyage (n).

"These considerations appear to me to show that, in order to uphold the Danish adjustment in this case as against the plaintiffs who have never assented to it, the defendants must prove two things. First, that the original voyage was in fact terminated at Copenhagen, and secondly, that it was so terminated either by agreement or necessity, *i.e.*, the occurrence of circumstances beyond the control of the defendants, and such as rendered the completion of the voyage on the terms originally agreed upon physically impossible, or so clearly unreasonable as to be impossible in a business point of view. . . .

"Assuming the original voyage to have in fact terminated at Copenhagen, neither the necessity for its termination there nor its termination by any agreement binding on the plaintiffs is proved. The desirability of having the average adjusted at Copenhagen, in order to obtain an allowance of distance freight, and the desirability of bringing about a separation of ship and cargo in order to obtain an adjustment at Copenhagen, were clearly seen by Hanson, and were pointed out by him to the defendants; and the correspondence satisfies me that the adjustment at Copenhagen was not the consequence of an inevitable breaking up of the voyage there, but was the cause of the voyage being broken up there, so far as it can be said to have been broken up with respect to the ship and the undamaged goods" (o).

(m) (1838), 9 Ad. & E. 314.

(o) *Hill v. Wilson* (1879), 4 C. P. D.

(n) 1 Arn. Ins. 2nd edit. 491.

at p. 332.

His lordship decided, therefore, that the plaintiffs were not bound by the Copenhagen adjustment.

Various cases
of tranship-
ment.

One case touched upon in this judgment,—that of cargo transhipped, and forwarded in another bottom, when the original ship is not repaired, may arise under three different forms: and this raises complications, not dealt with in this judgment, and indeed not as yet, I believe, dealt with in our courts.

First, the cargo may be forwarded to its destination under the original contract, in order that the shipowner may earn his freight under the bill of lading or charter-party, he himself bearing the cost of forwarding. Secondly, the cargo may be forwarded by the master, under his power of agency for the owner of the cargo, at a rate of freight exceeding that by the original contract(*p*). In such a case, the cargo is forwarded at the expense of the merchant; but still, if the new bill of lading is made out in the name of the master and consigned to his agent, the cargo may continue subject to the shipowner's lien for general average. Thirdly, the cargo may be forwarded to its destination by or on behalf of the merchant, and without retention of the shipowner's right of lien.

Case 1.—
Cargo for-
warded under
original
contract.

In the first of these cases, it can hardly be said that the voyage is broken up. There is simply the substitution by the shipowner of one bottom for another: a substitution which, under such circumstances, he has a legal right to make: the contract, and therefore the adventure which is constituted by it, still subsists: all rights under it, and amongst the rest the right of lien for, and recovery of, general average on delivery of the cargo to the consignee, still remain in force. In this case, therefore, it is conceived that the proper time

(*p*) See *ante*, p. 275.

and place for adjustment is the delivery of the cargo at the port of destination.

The second case is not so clear. We must take it that the shipowner is not bound to tranship. He has the right, then, apparently, to put in force his lien on the cargo for general average, at once, at the place where the ship is wrecked. It is at this time and place, therefore, that the cargo becomes liable for general average. The amount of its liability must consequently be determined by the state of facts which then exists. Suppose the cargo to consist of two or more portions, belonging to different owners, the liability of one portion cannot, after it has once thus attached to it, be increased by reason of the subsequent loss of another portion. Hence, if these portions be transhipped to their destination in two vessels, one of which is lost before arrival, that circumstance ought not to augment the contribution of the portion which arrives in the other. If, for example, A.'s goods and B.'s goods are of equal value at the place of wreck, so that, if the average were adjusted on the spot, A. and B. would each pay one-half of the cargo's share of the general average expenditure, then, since this liability attached to each owner at the time of the wreck, A. cannot be made to pay the whole because B.'s goods are lost on the way home.

Case 2.—
Cargo forwarded under shipowner's lien.

If this is sound, it follows that in this second case the general average must be adjusted upon the state of facts as existing at the time of wreck or condemnation, and upon the values at that time and place. It does not follow, however, that the law of that place is that which ought to govern the adjustment. The shipowner has elected, as he has a perfect right to do, to follow the goods with his lien to the place of destination, and to make his claim there. The law of the place where he

makes his claim is that which, it would seem, should determine the amount (*q*).

Case 3.—
Cargo forwarded by
cargo-owner.

In the third case it is otherwise. The forwarding of the cargo by the merchant or his agent is here in no sense done for the benefit of the shipowner: it is a matter with which he has no concern. So far as regards him, the voyage is absolutely broken up at the place of wreck; and, this being so, *Fletcher v. Alexander* (*r*) directly establishes that the place of wreck, at any rate if it is the port of loading, is the proper place of adjustment. An adjustment correctly made at that place, according to the law there in force, and based on the state of facts and values at the time of wreck, might be enforced by the shipowner before parting with the cargo. Such an adjustment, therefore, furnishes the correct basis for a settlement.

Effect of
subsequent
accident on
contribution.

§ 61. This seems the most convenient place for discussing a question, as to which opinions are at present divided amongst adjusters in this country, namely, whether the state of facts upon which an adjustment of general average is to be based should be, the facts as existing at the time when the sacrifice or expenditure took place, or at the termination of the adventure,—meaning by termination, either the ship's arrival at her destination, or the breaking up of the voyage in the manner already described.

This question becomes one of much practical importance whenever, after a sacrifice has been made or

(*q*) The editors doubt the correctness of this statement. It seems to them that as the common adventure came to an end at the place where

the ship was wrecked or condemned, the adjustment ought to be made according to the law of that place.

(*r*) L. R. 3 C. P. 375; *ante*, p. 293.

expenditure incurred, for the good of all, a subsequent independent accident, by destroying or damaging a portion of the property at risk, alters the relative values of the remainder. This second accident may affect, not only the contributing values, but also the amount to be allowed as compensation for the sacrifice.

Arnould lays down the rule as follows:—When the general average loss consists of a sacrifice of property, not replaced during the voyage, the adjustment must be regulated by the state of facts existing at the termination of the adventure. When it consists of expenditures actually incurred, the adjustment must be regulated by the state of facts at the time when the outlay was made (*s*).

This, however, has never been the prevalent practice in this country. The rule ordinarily adopted by adjusters has been, in the case alike of expenditures and sacrifices, to take as their basis the state of facts existing at the termination of the common adventure. It cannot be said that this practice has been followed universally. Some adjusters adopt a different rule. In the case of salvage, adjudicated upon by a court of Admiralty, and allotted on valuations of the ship and cargo made on the spot, there has been a tendency to accept those values as conclusive, even in the event of a material change in the proportions resulting from subsequent accident. There is not an established uniform custom on this point. Still, the opinion which on the whole prevails in practice is, that ultimate results should be the basis of adjustment.

The question is, which of these two views is the correct one.

(*s*) Arn. 2nd edit. p. 839; Mr. (Arn. 6th edit. p. 892. See also Arn. Maclachlan has some forcible and 8th edit. §§ 976, 977.) just observations on the subject.

That which is at present settled by decisions in the courts amounts only to this: that, in the case of jettison of cargo, the state of facts at the termination of the adventure, whether by arrival or by the voyage being broken up, must regulate the adjustment. This is determined by *Fletcher v. Alexander* (t).

"If," said Bovill, C. J., "after the jettison or the matter which is the subject of general average has arisen, the remainder of the goods are totally lost, and so no benefit accrues to the owners of the other goods from the jettison, no contribution can be claimed. The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand and the benefit derived on the other." (p. 382.)

"The average adjuster," said Montague Smith, J., "must take into consideration what would have been the state of the goods if they had remained on board and shared the fate of the rest of the adventure. In Arnould, 3rd edit. p. 803, it is said:—'The practical rule adopted is this: The property sacrificed for the general benefit is regarded as though it had never been lost, but actually was a portion of the whole mass of property on which the contribution is assessed at the time the adjustment is made.' That seems to me to be the correct view." (p. 387.)

On this point all the authorities, and the practice, are agreed. The question as to which there is room for difference of opinion is, whether the rule thus laid down for jettison is to be applied to the case of expenditures.

Arguments in
favour of
taking ulti-
mate results.

In favour of taking the state of facts at the termination of the adventure, there are the following arguments:—

1. The value of the property when it reaches the hands of its owners may be ascertained with precision.

Any other values can in general only be conjectural; and the adoption of conjectural values would render the adjustment too uncertain to be enforced.

2. There ought to be only one adjustment of the entire general average. Endless confusion would result from a multiplicity of adjustments: for example, from allowing the merchant whose goods have been jettisoned to make his claim for contribution by one distinct adjustment, and the shipowner whose mast has been cut away on the same voyage to make his claim by another. If there is to be one adjustment, that adjustment should be made on the same basis of facts throughout. When there is a jettison and a cash outlay on the same voyage, ultimate results must be the basis of the jettison: so that, in such a case, convenience requires that there should be the same basis for the outlay.

3. The ground of contribution to general average is, benefit received. "The whole law depends," according to the judgment just quoted, "on the loss of the one and the benefit to the other." This principle can only be completely carried out by adopting ultimate results as the basis of settlement.

4. Has the master authority to incur, at the charge of the cargo, a certain outlay for an uncertain benefit? Lord Stowell, in his judgment in the *Gratitudine's* case, puts the cargo's liability for salvage on the ground that the incurring of it may be for the benefit, and cannot possibly be to the detriment, of the cargo. "In the case of ransom," he says, "what was intended for the benefit of the cargo *may* eventually consume the whole: the proprietor will not be benefited in such a case, but he cannot be damnified; he will have had the chance of advantage without the danger or possibility of loss; for he cannot suffer beyond the value of the cargo, which, without such

ransom, would have gone to the enemy *in toto*" (u). But an adjustment which is not based on ultimate results may have the effect of making an owner of cargo pay general average in addition to losing his goods; that is, may put him in a worse position than if the general average act had never taken place.

It must not be objected that the master may be under the necessity, either of thus incurring a certain outlay for an uncertain benefit, or of leaving the whole property to perish. He is never, practically, reduced to this alternative; for he may raise money for such purposes by a loan on bottomry, or a sale of a portion of the cargo; having done which, if the ship and cargo should be afterwards lost on the voyage, the outlay becomes merged in that loss.

If, then, Lord Stowell's principle is to be carried out, it must be held that the master has no authority to bind the cargo for any outlay, the repayment of which is not made conditional upon the eventual safety or arrival of the cargo at its destination.

5. Even if the master's authority be not thus limited, yet, since the ground for contribution is benefit derived, it is reasonable that the expense should fall on those who have derived benefit, rather than on those who have not. If, after the outlay incurred, the ship and cargo utterly perish, so that no benefit is in result derived by any one, it may be right that, all being thus on an equality, all alike should contribute, since in that case it is necessary to fall back on the intention to benefit. But an intention to benefit is not so strong an argument for contribution as a benefit actually conferred. If some have in fact reaped an advantage, while others have merely had an advantage intended to them, but not conferred, these

(u) (1801), 3 Chr. Rob. 260.

two parties ought not to be placed on an equal footing in respect to contribution.

6. Lastly, the shipowner's right to lien for general average can only be made perfectly available for his protection by adopting the basis of ultimate results. On that basis, the whole general average is payable by the property which arrives; on that property alone can there be a lien: hence the lien covers the entire claim; which it would not do, were a portion of the general average chargeable against the property which has been lost on the way.

Such are the principal arguments in support of the prevalent practice. Let us now hear the other side.

Arguments
on the other
side.

The six reasons above set forth are partly reasons of convenience, partly founded on principle. Let us begin with the latter: and, after we have determined which method of adjustment is right in principle, then consider whether the practical difficulties of such a method are insuperable. There are, no doubt, cases in which a perfect principle ought not to be adopted, on account of the inconveniences which would ensue; this, however, must be a question of degree; we are not to prefer a convenient wrong to a right course which is, less convenient indeed, yet not impracticable.

The question of principle, reduced to its simplest form, is this: does an expenditure, in the nature of general average, incurred in the middle of a voyage, constitute a debt which, at the moment it is incurred, is due rateably from each contributor; or is, not merely the payment, but the actual indebtedness, postponed to the termination of the adventure? In the former case, if the indebtedness exists, the proportion due from each contributor must really be determined at the time,—

must be determined, that is, by the state of facts which then exists (*x*).

Now, with regard to one great class of such expenditures, namely, such as constitute actual salvage, it is undeniable that the indebtedness of each separate owner of ship and cargo exists at the moment when the salvage service is completed. A salvor who rescues the ship and cargo from danger, and brings them to a place of safety, is not bound to wait for his repayment until the voyage is completed. He has a lien on the ship for the salvage on the ship, and a lien on the cargo for the salvage on the cargo. He has the right to proceed against each separately. There is nothing to prevent the owner of the ship, or the owner of any portion of the cargo, from arranging with the salvor separately for his own share of the salvage, and leaving him to enforce his separate claim against the remainder of the property. This being so, it is obvious that the indebtedness of each portion exists determinately at that point of time. Can it make any difference if we suppose that, in place of the salvor's

(*x*) "When an expenditure is incurred for the general benefit, the money by which it is discharged is either supplied by the shipowner out of his own funds, or raised by a loan from some third party. In either case it is obvious that he has a personal and absolute claim against all the parties interested in the adventure, in respect of the money thus laid out for their benefit, and that from the moment the advance has been made. It is equally obvious, on the true principles of adjustment, that they are bound in equity to liquidate this claim in full, whether any part of the property, for whose benefit the outlay was made, be ultimately saved or not. Were this not

so, the object to be had in view in every adjustment of general average would not under all circumstances be attained; for, in those cases where the ship and goods, after being relieved by the expenditure, wholly perish before arriving at the port of destination, the party making the advance would, if no contribution were to be made, be worse off than the parties for whose benefit it was incurred; as he would not only have lost, like the rest, all his share in the adventure, but moreover would remain burdened with a debt contracted on their account, or be the loser of a sum of money laid out for their safety." (Arn. 2nd edit. p. 938. See Arn. 8th edit. §§ 976, 977.)

dealing separately with each portion of the property, the master, acting under the powers he has when at a distance from the owners of the ship and cargo, litigates or compromises the salvage on behalf of all, paying a fixed sum for all? This circumstance surely cannot have the effect of changing the period of the indebtedness of each. Salvage, then, is a debt absolutely due from each owner of property salvaged at the moment when it is incurred.

Salvage is the type or model of general average expenditure, as jettison is that of general average sacrifice (*y*). The basis of the claim for contribution in respect of outlay, is, that the master has incurred the expenditure, or performed the act which occasioned it, not in his capacity of servant to the shipowner, but under his more enlarged powers of agency on behalf of all. It is now questioned whether these powers include the right, in case of necessity, of making a certain outlay in order to procure an uncertain, but much greater, advantage.

Lord Stowell's dictum, above cited, taken by itself, would certainly lead us to the conclusion that he has no such power. But it must be remembered that this celebrated judgment is now more than a century old; and that it was given at a time when the law of general average had scarcely found its way into the English courts, and was very imperfectly understood. It is a mere dictum, very remotely, if at all, connected with the question at issue before the court. Other similar dicta in the same judgment have been much discredited. In *Duncan v. Benson*, for example, where portions of this

(*y*) Salvage proper, as distinguished from salvage under contract, is not, strictly speaking, general average. See Carver, § 396; Marine Insurance Act, 1906, s. 65; *ante*, p. 175, n. (*b*); but the argument in the text does not seem to the editors to be sensibly affected by this distinction.

judgment were cited, Pollock, C.B., observed that the judgment must be taken *secundum subjectam materiam*, and that the dicta cited referred to a question entirely beside the case; and he accordingly declined to apply the dicta in question (z).

If, then, we examine the question apart from authority, we shall see that the master's right to incur outlay is not thus limited. For, in the case of an absolute expenditure for general average, followed by an utter loss of the ship and cargo, it is not questioned that such outlay is recoverable from the owners of the ship and cargo rateably. The lien is of course gone; hence there may be a difficulty of tracing the actual owners of the property, and so a practical difficulty of recovering payment; but it is not denied that, when this difficulty is overcome, there is a right of recovery. Again, in the case of salvage, it has never been doubted that the master has the right, at a distance from the owners, and where communication is impracticable, to settle with the salvors by an absolute payment: and, having done so, not merely has the right, but is bound, not to resort either to bottomry or a sale of goods to raise funds, if he can obtain the requisite advances on the personal credit of his owners. It seems, then, to be clear beyond question that the master, acting under his power of agency on behalf of all, has authority to incur an absolute outlay of money, repayable at all events, for the sake of procuring a benefit which may in result, owing to a subsequent accident, prove to have been useless. This power is of course limited by his duty to act judiciously.

The contrary doctrine would indeed be in the highest degree mischievous. Were the captain not

(z) *Duncan v. Benson* (1847), 1 Exch. 537.

invested with this power, it might frequently happen that, for want of it, the whole property might be endangered, or the object of the adventure frustrated. The captain might be in the position in which a moderate and reasonable outlay, such as he would not hesitate to make were the whole property his own, would enable him to proceed on the voyage. He could not legally raise money by bottomry or a sale of cargo, because the agent on the spot is ready to advance the money for a draft on his owner. It would be ruinous to wait for remittances from home : indeed, he is afraid to wait, lest the unnecessary delay should bring upon his owners the penalties of deviation. Thus there would be a complete dead-lock, merely for the want of his possessing a simple, yet essential, authority.

The question of principle, then, seems to be clear. For actual outlay, incurred for the sake of all, each owner of property is actually a debtor, in respect of his proportion, so soon as the outlay has been incurred. It is not the indebtedness, but simply the repayment, which is postponed till the termination of the voyage. On principle, then, the proportions should be determined by the state of facts which then exists.

The only argument of principle, on the side of taking ultimate results, which has not yet been dealt with, is that marked as No. 5 : namely, that a mere intention to benefit should not rank as an equal ground of contribution with a benefit actually conferred. This, however, seems to disappear, when we distinctly apprehend that the period of indebtedness, and therefore the period at which we should enquire into the grounds for contribution, is, not the termination of the adventure, but the time when the outlay was incurred. At that period all the contributors were in this respect on an equal footing. The whole

was at risk: the arrival of no part was certain: there was at that time nothing but an intention to benefit all; yet this by itself, as we have seen, is a sufficient ground for making all contribute.

The true principle being, then, that the contribution for actual outlay should be based on the state of facts when the outlay was incurred, we are in the next place to consider whether it is practicable to carry this principle out.

The first objection raised is that, whereas the value of the property when it reaches the hands of its owners at the port of destination can be ascertained with precision, the value at any intermediate point must be more or less conjectural. To this it must be answered: The value, at an intermediate port, of property which is not intended for sale there, and indeed cannot be sold, but is to be carried on to its destination, is in fact its value at its destination, deducting the cost of conveying it thither, and also deducting the value of the chance of its being lost on the way. This principle, which is evidently sound, is adopted in the Court of Admiralty as the basis of valuation for salvage. Thus, where a cargo bound for London was saved and carried into Lisbon, and the amount of salvage was to be determined by its value at Lisbon, Dr. Lushington refused to adopt as his basis either the market price at Lisbon, where the goods were unsaleable, or the value in London without deduction. The thing really saved by the salvors, he said, was the value in London, subject to a reduction in respect of the cost of conveying it to that port, and the risk of its never arriving (*a*). Now, in fixing relative

(*a*) *The George Dean* (1857), 1 Swab. 290. See also, to the same effect, *The Norma* (1860), Lush. 124, where Dr. Lushington said:—"The proper rule in civil salvage is, to estimate the value of the property

values for contribution to general average, the proportions will be the same, if we leave out of view the deduction for sea risk, this being the same rateable proportion, or percentage, for each portion of the adventure. Hence, in all cases where there is no second accident, an adjustment based on values on the spot, and one based on ultimate arrived values, will give precisely the same results. A difficulty can only arise when, by an accident subsequent to the outlay, a change of circumstances has taken place. This difficulty is not really formidable. It is only necessary to determine what amount of loss or damage has taken place subsequently to the outlay; a calculation which very often has to be made for the purpose of claiming on the underwriters: and to add this sum to the arrived value.

The difficulty is only serious when there are no arrived values,—that is, when the ship and cargo are either totally lost, or, from subsequent accident, are sold at some place short of the destination. Here there are no determinate data by which the market values can be regulated. But the difficulty is not greater in the case of a wreck with salvage than in that of an utter loss. In this latter case, the difficulty is in practice somehow overcome: since, when there is an utter loss following a

saved at the place where the services of the salvors terminated.” Accordingly, the question before him being, whether any salvage was due in respect of freight, when the salvage service had terminated at a point where freight was not yet earned, but where a considerable portion of the voyage had been performed, the learned judge held that the salvors were entitled to salvage upon a considerable portion of the freight. He would not enter into a detailed calculation as to what items were proper

items of deduction, but, dealing with the matter roughly, gave salvage on a freight estimated at about half the entire amount, the part of the voyage performed being from Honduras to Bermuda, and the part left unperformed being from Bermuda to London. In the case of salvage for recapture, where the proportions due to the salvors is fixed by Act of Parliament, a different rule prevails. (*The Progress* (1810), Edw. 221; *The Dorothy Foster* (1805), 6 Chr. Rob. 88.)

general average outlay, it has never been contended that the outlay should not be repaid at all. In such a case the best approximation that can be made is accepted and acted on. There is, then, in this respect, no difficulty in carrying out the system of contribution upon values on the spot, except such a difficulty as already exists, and is overcome, in the system now adopted in practice.

The difficulties which have been started with respect to the shipowner's right of lien may be removed by one remark,—that right of lien is insurable. It has been determined in the courts that a shipowner's right of lien on cargo in respect of a general average outlay is an insurable interest (*b*). In the great majority of cases, if not in all, a shipowner, who has been drawn upon for advances at a port of refuge, has time and opportunity to make an insurance which will, if properly framed, completely protect him against his risk of losing the cargo's share of the outlay by reason of a subsequent accident which may deprive him of his lien.

Thus all the practical difficulties which have been suggested disappear upon examination (*c*).

Such are the main arguments on either side of this important question. It is a question which, in the present divided state of opinion amongst adjusters, must probably remain a moot point until settled in a court of law. The reasons in favour of taking, in the case of

(*b*) *Briggs v. Merchant Traders' Association* (1849), 13 Q. B. 167. See Marine Insurance Act, 1906, s. 5 (2).

(*c*) I have not, in the text, dealt with objection No. 2, namely, that there ought to be but one adjustment of the entire general average, and that the adoption of one basis for sacrifices and another for expendi-

tures would be inconvenient. The inconvenience would be infinitesimal. There must be one adjustment, but there can easily be two apportionments, on different contributory values, followed by a balance of account or a simple sum in addition. Much greater complications than this are often dealt with by adjusters without difficulty.

expenditures, the values according to the state of facts at the time when the outlay is incurred appear to me decidedly to preponderate (*d*).

§ 62. When a ship carries cargo destined for two or more ports—a practice which the extension of steam navigation has rendered much more frequent than it formerly was—what is the proper place for adjusting a general average?

Cargoes
destined for
several ports.

Some have thought that the proper place is, the first port of destination for any portion of the cargo at which the ship arrives subsequently to the general average act—whether that act be a sacrifice or the incurring of an expenditure. This port is the termination of that adventure which is common to all the contributors. The subsequent portion of the voyage is a matter which concerns only a portion of them. If the general average

(*d*) Mr. Carver (§ 428) and Mr. MacArthur (Ins. 2nd edit. p. 205, n. (a)) adopt the view that expenditures ought to be adjusted on the facts as they exist at the termination of the adventure. On principle, however, the view developed by Mr. Lowndes in this argument is supported by the judgment of Gorell Barnes, J., in *The Mary Thomas*, [1894] P. 108, which was affirmed by the Court of Appeal. (Ib. 122.) In the case of a sacrifice of part of a ship, the shipowner is entitled to recover his whole loss from his insurers, leaving them to obtain, by virtue of subrogation to his rights, the contributions due from other parties. (See *Dickenson v. Jardine* (1868), L. R. 3 C. P. 639; Marine Insurance Act, 1906, s. 66 (4).) The learned judge, however, refused to apply this rule in the case of a general average expenditure. “It seems to

me,” he said, “that this proposition, which is found in *Dickenson v. Jardine*, is wholly inapplicable to the case of expenditure, and I think it can almost be demonstrated to be wrong in such a case, because the operation of saving is taken for the benefit of both the ship and the cargo, leaving out the freight for a moment, because it is in the same position as the ship; and therefore the captain, who at this time, under ordinary circumstances, acts as agent for the person whose property is at risk, spends the money on behalf of all who are interested, and all who are interested must contribute to it, and therefore the shipowner ought only to contribute so much.” Accordingly the learned judge held that the shipowner could only recover from his underwriters the ship's proportion of the general average expenditure.

consists of the jettison of goods destined for this first port, the owners of them have the same grounds for claiming an immediate and absolute indemnity, unaffected by the risks of the subsequent voyage, as they would have were the remainder of the cargo intended to be delivered at the same place.

If this be so, it follows that the law of this first port, the values of all the property there and at that time—to be computed on the principle already laid down—and the state of facts which then and there exists, are to form the basis of the adjustment in such a case (*e*).

In order to place on an equal footing the goods destined for the first port, as to which the voyage is completed, and those which have still to perform a further portion of the transit, a reduction should be made from the contributory value of the latter, equivalent to the risk of non-arrival at their port of ultimate destination.

To this view, however, objection has been taken on the following grounds:—The ordinary rule, that the adjustment of general average should be made at the port of discharge, is mainly founded on considerations of convenience, and particularly because it is there that the value of the goods can be most fairly estimated, and the rights of the parties most effectually enforced, and it is manifestly convenient that the law to be applied should be the law of the places where the rights are enforced (*f*). But this reason of convenience, in the case of cargo destined for two different ports, would seem to point rather to the second than the first port. It would be impossible to make a final adjustment at the first port without waiting to learn the result of the entire voyage,

(*e*) See 2 Parsons, Ins. 360, in confirmation of this view.

(*f*) See *Simonds v. White* (1824), 2 B. & C. 805.

on account of the impossibility of determining the true contributory value of the goods intended for the second port. Supposing the ship were lost on her voyage between the two ports, could the cargo then on board be made to contribute towards the previous general average? The lien on those goods would be gone, and their liability is at present an undetermined and doubtful question, not only in English but in most foreign laws. Theoretically, it may no doubt be said that, as things stood when the ship had reached the first port, these goods, equally with those destined for that port, had derived for the time an advantage through the sacrifice, from being brought in safety so far on their voyage; which advantage might fairly be measured by the value of those goods at their ultimate market, *minus* the value of the risk, that is to say, the cost of insuring them to that place from the first port of discharge. But this would probably be regarded by a court of law as too theoretical: the chances are, that an English court would hold that the owner of the goods in the case supposed had practically derived no benefit from the previous sacrifice; this latter view being more practical, more convenient, and more in harmony with decided cases. If this be so, since an adjustment, to be enforced on the spot, would be impossible at the first port of discharge, ought it not to be made at the second?

To this it must be answered that there are difficulties, perhaps equally serious, in the way of making the adjustment at the second port. The owners of the cargo intended for the first port would surely be entitled to say that they ought not to be placed, in any event, in a worse position by reason of the circumstance that some of their fellow cargo-owners are not ending their voyage where they are, but are going on further. Suppose, for

example, that the general average consists of damage done to the cargo by water poured in to extinguish a fire, and that according to the law of the first port this damage is made good by contribution, while by the law of the second port this damage, as by English practice not so long ago was the case, is not so treated, would it be tolerated that the owners of cargo for the first port should by this circumstance be deprived of their claim for compensation? They were no parties in any sense to this second portion of the voyage, and their legal rights ought not to be affected by it. Or, to take a case of still more general application: Suppose that by the law of the first port the ship contributes to general average on her full value, but by that of the second port (*e.g.*, by French law) on the half value only, would it be right that this circumstance should throw on the owners of the cargo destined for the first port an enhanced proportion of the general average?

In view of these difficulties, and in the absence of a legal decision on the point, the course adopted, in a case of some importance as to amount, was as follows:—The steamer *Sarnia*, having on board cargo, partly destined for Halifax in Nova Scotia, partly for Portland in the United States, met with an accident which obliged her to put back to Liverpool, where her cargo was discharged, for repair; after which she proceeded, and delivered her cargo at both ports without further mishap. The adjustment of general average as between ship, freight, and cargo, was prepared by a Halifax and a United States adjuster, associated together. They drew up a joint statement containing two columns for general average, one headed “Halifax,” and the other “Portland”; and they certified that the amounts shown in the first column were the amounts payable according

to British law, and should be paid by the owners of the cargo delivered at Halifax, and the amounts shown in the second were according to American law, and should be paid by the owners of the cargo delivered at Portland. And this was acted on (*g*).

The settlement between the shipowner and his underwriters on ship and freight presented a little difficulty. The policies contained the clause: "General average and salvage charges payable according to foreign statement if so claimed." Was the owner entitled to claim under whichever column of this adjustment he might select? If he might do so, he might have made a large profit, by claiming on the ship policy under the Portland column, and on the freight policy under the Halifax column. It was thought, however, that he was not entitled to this, but could only treat as "the foreign statement" that statement, or portion of statement, which was in fact operative so far as concerns the cargo. In the present instance, if we suppose the value of the Halifax cargo to be as three, and of the Portland cargo to be as four, the whole being seven, the shipowner was treated as entitled to four-sevenths of the amount in the Halifax column and three-sevenths of that in the Portland column of this composite adjustment. And this, after some discussion, was agreed to (*h*).

(*g*) The question which arose in this case is discussed by Mr. Carver (§§ 425, 426), who comes to the conclusion that on the whole the adjustment should take place at the end of the voyage, on the basis of the arrived values as there ascertained. This seems to be the rule generally acted upon in Continental countries.

(*h*) The editors confess that they do not understand on what principle

the amount recovered by the shipowner from his underwriters was fixed; and the difficulties which may arise in the settlement of the general average between the shipowner and his underwriters seem to them a strong reason for not adopting the course followed in this case, of having adjustments on different bases with the different sets of cargo-owners.

CHAPTER VII.

MODE OF COMPUTING THE AMOUNT TO BE MADE GOOD.

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§ 63. Having thus defined the time, place, and state of facts, which are to form the basis of the adjustment, there ought to be little difficulty in completing this portion of the subject, by pointing out what amounts are to be made good by contribution. The subject may be considered, first, in the case of disbursements, secondly, in that of sacrifices.

PART I.—*Disbursements.*

The amount to be replaced is simply the amount expended, *plus* the cost of raising funds.

Concerning the amount expended, nothing more need here be said: for we have dealt with the conditions which determine what disbursements are to be treated as expenditures for the common safety of ship and cargo.

Several, and some of them difficult, questions, however, arise in connection with the cost of raising funds.

On principle, as the entire business of raising funds for general average, like general average itself, belongs to that reserved portion of the contract of affreightment, “the perils of navigation excepted,” for which no man is directly responsible, it would seem obvious that the liability to supply the funds is a mere appurtenance to the liability to pay the general average, and should fall conjointly on all.

In those old times when the merchants sailed with the ships, an ingenious arrangement, as we learn from the *Consolado*, was in common use, whereby these merchants, often having on board large sums of money, proceeds of former or materials for future ventures, or in any case having at hand goods by the sale of which money could be raised, were the ordinary financiers on any emergency, being bound in case of need to supply the master with either money or goods for sale. They were repaid and secured in the same method as in the case of jettison; that is to say, if the ship arrived, they were put on a par with their co-adventurers by a prompt and secure repayment, but if she perished on the voyage, they got nothing beyond the consolation that they

Amount expended.

Cost of raising funds.

Should be borne alike by all the parties interested.

Oldest known practice as to this.

were no worse off than if they had lent or sold nothing (*a*).

Authority of
master when
alone.

When the merchants began to live ashore, the authority of the master was so far extended, that he had power to do for the merchants that which they would presumably have done, or have been obliged to do, had they been there: that is, in case of necessity, when no money was to be had from the shipowner, or when not enough was to be had by pledging the ship and freight in the familiar way of bottomry, to pledge likewise the cargo, or, if that could not be done, even to sell so much of it as would raise the requisite amount. It would take too long here to enter into a full discussion of the law of bottomry or of these forced sales; but one or two points may be mentioned, as to which the laws of different countries are not yet agreed, and which consequently give rise to interesting questions of the conflict of laws.

(*a*) *Consulado*, Chap. 61 (106). "Again, the merchant is bound towards the master of the ship (*senyor de la nau*) that if the merchant have money, and if they are in a place where the master has need of supply or things necessary for the ship, the merchant must lend it to him, so far as the sailing-master (*notxer*) and the other merchants shall agree that he ought to do. And on this account all the part-owners (*personers*) who shall be in the ship, and the lenders (*prestadors*) must all bind themselves (*obligar*) to the said merchant. But if the master (*senyor*) of the ship, or the part-owners, or the lenders, shall find any man who will lend to them, the aforesaid merchant is not bound to lend them anything."

(2 *Pard.* 109.)

Chap. 62 (107). "Again, further, if the master of the ship shall be in need of money, and cannot obtain enough as aforesaid, and is in a desert place, and if the said money is necessary for the dispatch of the ship, and if the said merchants have not money, they are bound to sell of their merchandize to dispatch the ship; and no lender (*prestador*) or part-owner can say anything or make opposition until the said merchants shall have been paid, excepting (*salvo*) the wages of the mariners. It is, however, to be understood, that the merchant shall see and make sure that that which he lends is for the dispatch of the ship and necessary for her." (2 *Pard.* 110.)

Forced sale of goods.

§ 64. One complication arose from the English common law judges formerly not having quite recognized to its full extent the now-established doctrine, that in what the master spends or sacrifices over a general average act he is to be treated as acting, not in any special sense as the agent or servant of the shipowner, *quâ* carrier, but as the agent, either of all parties, as accepting the gift, or of that one of the co-adventurers who, on an implied condition of repayment, makes the gift for the sake of all.

Sale of cargo
to raise funds.

The first class of decisions I will mention bear upon the difficulty how to treat the case in which the actual proceeds of the goods thus sold exceed the amount to which their owner would be entitled in the event of safe arrival; which may happen, either because of their fetching an abnormal profit on the forced sale, or by reason of the remainder of the cargo being cast away on the way home.

In *Richardson v. Nourse* the question was, whether the owner of goods sold in Mauritius to pay repairs to the ship and other port of refuge expenses was entitled to their net value at the port of destination, or to their actual proceeds, the latter being the larger sum of the two. Three arbitrators, to whom the matter had been referred, had pronounced that the owner was entitled to the larger sum; and the court, on being appealed to, refused to disturb their award. "The goods have been sold," said Abbott, C. J., "for the necessary repairs of the ship while on the voyage, and have actually fetched a higher price than they would if they had arrived at the port of destination. There is no decided case precisely in point. The

Richardson v.
Nourse.

possibility, even, of the goods fetching any price higher than that of the port of destination did not occur to any of the writers whose works have been referred to in the course of the argument. It must be recollected, too, that this was a reference to mercantile men, and they, perhaps, may have decided the question upon mercantile usage. I cannot say that their decision was wrong; for by holding that the owner of a ship may lose, but that he can never gain, by such a sale as this, we shall furnish the strongest possible inducement to him to take care that all the goods are conveyed to their place of destination. I do not go the length of saying that where arbitrators proceed on a mistake of a clear principle of law, the court will not set aside their award: but I cannot, in this case, say that the arbitrators have decided contrary to any clear well-established principle of law, and I think, therefore, that this rule should be discharged." And Holroyd, J., said: "There is strong ground for contending that the owner of goods should receive a compensation for the goods sold according to their highest value. If the master could get money by other means, he had no right to sell; and if he had sold the goods, the owner ought to be entitled to the actual proceeds; for the owner of the ship, in the event that has happened, ought not to be allowed to make any profit by such sale" (b).

*Atkinson v.
Stephens.*

Atkinson v. Stephens expressly decides no more than that, if the ship is lost on her way home, the owner of goods sold at a port of refuge to raise funds for repairing her is not entitled to recover the market value at the port of destination. In the argument, it seems to have been admitted by counsel for the shipowner, on the authority of *Richardson v. Nourse*, that he was entitled

(b) *Richardson v. Nourse* (1819), 3 B. & Ald. 237.

to the amount of their proceeds; and Alderson, B., in the course of the argument, said: "The owner of the goods is entitled to the amount which they actually fetched, although the vessel does not arrive; but if she does, then he is entitled to the sum which such goods would fetch in the market. The owner of the goods does therefore, in fact, derive an advantage from the sale" (c).

Hopper v. Burness was a case tried in 1876, in the Common Pleas Division. The ship was chartered to carry a cargo of coals from Cardiff to Point de Galle. On the voyage she was disabled in a storm, and had to put into the Cape of Good Hope, where, in order to defray the expense of the repairs, the master sold a portion of the coals. Subsequently she proceeded, and arrived at her destination. An adjustment of average was drawn up, in which the owner of the coals was credited with the actual proceeds of his coals, the amount of which was considerably more than either the cost of them, or the amount they would have fetched at Point de Galle, after deduction of the freight. In this adjustment no allowance was made in respect of the freight on these coals. The shipowner sued the owner of the coals, claiming to be entitled to at least freight *pro ratâ itineris*. The Court of Common Pleas, however, decided against his claim. "Freight *pro ratâ*," said Brett, J., "is only payable when there is a mutual agreement between the charterer or shipper and the captain or shipowner, whereby the latter being able and willing to carry on the cargo to the port of destination, but the former desiring to have the goods delivered to him at some intermediate port, it is agreed that they shall be so

*Hopper v.
Burness.*

(c) *Atkinson v. Stephens* (1852), 7 Exch. 567, at p. 575. See, on this subject, Phillips, Ins. § 1364.

delivered, and the law then implies a contract to pay freight *pro ratâ itineris*." This evidently was not the case here. "The charterer," the learned judge continued, "has, I think, an option to treat the proceeds of the sale as a loan; or may say, You have sold my goods against my will, and though by the maritime law that is not a wrongful sale, still I am entitled to and claim an indemnity against any loss occasioned by the sale. If he selects the former alternative, what is there to give rise to an implication that freight *pro ratâ* is payable? If he thinks that the goods have fetched more at the intermediate port than the remainder will do at the port of destination, why may he not treat the transaction as a loan at once, and sue for the amount before the ship arrives at her destination? If the ship should be lost on her voyage between the intermediate port and the port of destination, the charterer has no option; he cannot ask for an indemnity on the footing that the goods would have fetched more at the port of destination. The basis of the claim of indemnity in such a case is the supposition that the goods would fetch more at the port of destination than they did where sold. If the ship is lost the charterer or shipper never can claim an indemnity against the shipowner; the adventure is lost by perils of the sea. But I apprehend, though he could not claim an indemnity, he could treat the transaction as a forced loan, and claim the amount of the price for which the goods were sold. If the goods fetch more at the intermediate port, the owner of the cargo naturally would elect to treat the matter as a loan; but when he thinks it for his interest to insist, and does insist, on an indemnity, on the footing that the value of the goods must be treated as if they were carried to their destination, then he must allow for the freight that would

have been earned by carrying them there. Here the defendant had a right to treat the proceeds of the sale as a loan, and did so, and under those circumstances I see nothing to raise an implication of a liability to pay freight *pro ratâ*. This decision may seem hard, but the hardship, if any, arises from the form of the contract entered into. The loss to the shipowner is a loss by maritime perils, and the answer to any argument of hardship seems to me to be that this is a case in which the proper remedy is by insurance of freight" (*d*).

The same principle was applied, in a somewhat remarkable manner, by Watkin Williams, J., in *Pirie v. Middle Dock Co.* (*e*), where a cargo of coals, damaged by water poured in to extinguish a fire, was sold at a price far beyond its net value (less freight) at the port of destination. The merchant was held entitled to receive the entire proceeds, and the shipowner to recover his loss of freight as a general average, so that the merchant recovered an abnormal unexpected profit—it might be double or treble the cost of his goods—at the expense, virtually, of the underwriters on ship, freight, and cargo.

*Pirie v. Middle
Dock Co.*

All these cases, it is observable, apply solely or principally to the raising of money for repairing the ship, or for requirements of the master not strictly be-

(*d*) *Hopper v. Burness* (1876), 1 C. P. D. 137, at p. 141.

(*e*) *Pirie v. Middle Dock Co.* (1881), 44 L. T. 426. The shipowners did not dispute the right of the cargo-owners to receive the proceeds of the sale, and the only question decided was, that the shipowners were entitled to a contribution in general average for the freight of the damaged cargo. Owing to the fortunate accident that the damaged cargo realized

more than its value at the port of destination, the shipowner or his underwriters were relieved from liability to contribute to the sacrifice of the cargo, so that the merchant's profit by the sale was not gained at anyone's expense. An adjustment on the footing that there had been no sacrifice of cargo, but only one of freight, seems to the editors the proper one under the circumstances of the case.

longing to general average; or so at least it seems to have been assumed in the judgments. Were it otherwise, *i.e.*, had the expenditure which necessitated the sale of cargo to raise money been strictly an extraordinary expenditure for the common safety, it would not be easy to reconcile the arguments by which the judges throw a special liability upon the shipowner, treating the sale as in some peculiar sense an act of his, with the present doctrine as to the master's agency on behalf of all. If this forced sale is to be treated like a jettison, the proprietor ought, in no event, to be in a better position than if some other person's goods had been taken (*f*)—a consideration apparently left wholly out of sight in these judgments (*g*).

(*f*) "The leading principle of general average," says Arnould, "is this:—*That all the parties interested in the adventure, for the benefit of which the loss was incurred, should be sufferers by the loss in exact proportion to the extent of their respective interests, but no farther*; and this object can only be attained when the party whose property has been sacrificed, whose money has been disbursed, or whose credit has been pledged for the general benefit, is placed, by the result of the adjustment, exactly in the same position he would have stood in, had the sacrifice been made, the expense incurred, or the credit pledged, not by himself, but by some other of his co-adventurers." (2 Arn. 2nd edit. p. 937.)

(*g*) Several of the English writers adopt the view that the sale of part of the cargo to raise funds to defray general average expenses is to be treated as a sacrifice of the goods analogous to a jettison. (See Stevens, p. 16; Benecke, p. 261; 2 Arnould,

2nd edit. p. 909; Carver, § 432.) Arnould and Carver also state, on the authority of *Richardson v. Nourse*, *supra*, that when the goods have realized more than their net value at the port of destination, they must be contributed for on the higher value; but Stevens and Benecke consider, like Mr. Lowndes, that even in this case the goods should be contributed for on their estimated value at the port of destination, on the principle that those who would have borne the loss ought to receive the profit. Equity certainly requires that if there be a loss on the sale, the goods sold should be contributed for on their value at their destination. Yet it may be argued that equity does not require that the shipowner and the other cargo-owners should be placed in a better position than if he or the contributions of all the parties had provided the funds for the port of refuge expenses. They certainly would be in a better position in every case where the actual proceeds

Bottomry loans on cargo.

§ 65. The master's right to raise money by a Bottomry loans on cargo. bottomry loan on the cargo comes into play only when

of the goods exceed their net value at the place of destination (together with the freight thereon, if such freight has also to be contributed for). In all such cases the fairest rule, it is submitted, would be to make all the parties contribute the amount of the general average expenditure, and allow the owner of the goods sold to have the profit which, without any loss to other parties, he could derive from the sale.

If, as no doubt would usually be the case, the ship and the cargo have at the time of the sale already been placed in safety, it may, however, by a strict application of the principle laid down in *Sveinssen v. Wallace*, be contended that the sale is not in itself a sacrifice. Nor, it may further be argued, can the sale be regarded as a loss consequential on a previous general average act, for it is really due to the circumstance that the shipowner has not provided the necessary funds for the repair of the ship and the port of refuge expenses, and that the master is unable to raise funds in any other way. On this view, the sale may be regarded as a loan of the goods to all the parties who have to bear the general average expenses, and if the proceeds of the sale are less than the net arrived value of the goods, together with the freight, the difference may be treated as the expense of providing the necessary funds, and, as such, part of the general average loss. But if the sale be regarded as a loan of the goods, a difficulty arises if the ship and the

rest of the cargo be afterwards lost. If the proceeds of the sale are to be reimbursed to the owner of the goods sold, he obviously gains an unfair benefit at the expense of the other parties; for if his goods had remained on board, they would have shared the fate of the rest of the adventure. To avoid this result, it might be necessary to treat the transaction as a loan repayable only on the completion of the voyage; but as the theory of a loan has never been adopted or discussed, there is no authority for implying such a term in this fictitious transaction.

Another view may also be suggested, viz., that it is primarily the duty of the shipowner to provide the necessary funds for the ship's repairs and expenses at a port of refuge, and as these funds have in effect been provided by the owner of the cargo, the latter is entitled to treat the transaction as in the nature of a loan to the shipowner. (See the remarks of Brett, J., in *Hopper v. Burness*, *ante*, p. 324.) On this theory, even though the ship and cargo were subsequently lost, it is apprehended that the owner of the goods sold would be entitled to claim the proceeds of the sale from the shipowner. (See *Atkinson v. Stephens*, *ante*, p. 322; *Hopper v. Burness*, *ante*, p. 324.) The latter would then have the same right to recover the amount from the interests at risk when the general average expenditure was incurred as (according to the view already put forward) he has when he has himself disbursed the expenses.

he has exhausted every other expedient except that of selling it; that is to say, when no money is to be had by applying to the shipowner, or pledging his personal credit, or by a bottomry loan on the ship and freight only. It has from very old times been requisite that the shipowner should first be communicated with, whenever it was possible to do so without unduly delaying the voyage. More recently, in England, and some other countries, this rule has been extended to the owners of the cargo; and, by the law of those countries, no bond on cargo is valid if this precaution has been neglected; that is to say, unless, before borrowing, the master has first applied to the owners, consignees, or shippers of the cargo, if he knows how to reach them in time, and this by telegram, if necessary, giving such information of his requirements and intentions as may give them an opportunity of supplying him in some less onerous method (*h*).

English rule: master must first apply to owner of cargo, if practicable.

§ 66. This rule, which is by no means universal in all countries, indicates probably a first step in the second great transition in commerce, a transition which in point of importance is hardly if at all exceeded by the first great revolution so often alluded to, when the merchants

If, on the other hand, the voyage were completed the owner of the goods could, no doubt, elect to be paid their net value at their destination (see *Hopper v. Burness, ante*, p. 324); and in the event of his doing so, the shipowner would, it is submitted, be entitled to treat the loss on the sale, *i.e.*, the difference between such net value and the proceeds of the goods, as the cost of raising the necessary funds to defray the general average expenditure, and to recover this loss, as well as the

expenditure, in general average.

(*h*) The cargo-owners, if they are known to the master, are no doubt the proper persons with whom to communicate; but where a master, not knowing who were receivers of the cargo, applied for instructions to the shipping agents at the port of loading, and they referred him to Lloyd's agent at the port of distress, on whose advice he acted, the Court of Session held that he had discharged the duty of communication. (*Klein v. Lindsay* (1910), Sess. Cas. 230.)

ceased to live on board. Steam in its various forms, railways, and the electric telegraph, with the various organizations which these have rendered possible, now bring the owners and insurers of the cargo almost as near to the distressed shipmaster, both with counsel and funds, as in the older time: imposing duties on the former, and limiting, to a corresponding extent, the authority of the latter.

This change has led to an interesting question or two on the conflict of laws, with which this section may be closed.

A question arose in Admiralty on the validity of a bottomry bond on cargo taken at Fayal by the master of the Italian ship *Gaetano and Maria*, for a voyage for London. It appeared that the master had given no previous notice of his intention to the owners of the cargo, which there was time enough for, but which the master pleaded that by the laws of Italy he was not bound to do. Thereupon the question arose whether, on such a point, the law of the flag, the Italian law, or that of this country should prevail. In the court below, the Admiralty Division, Sir Robert Phillimore held, on the authority of Dr. Lushington, in *The Hamburg* (*i*), that the general maritime law as administered in England was to be applied, and not either the *lex loci contractus* nor the law of the ship's flag. The well-known principle laid down in *Lloyd v. Guibert* (*k*) was not, in the opinion of the learned judge, applicable to the present case, because the question there was, by what law a contract of affreightment, and not the right of a master to hypothecate cargo, should be governed (*l*). This decision, however, was reversed in the Court of Appeal.

(*i*) (1863), Br. & Lush. 253, 259. (*k*) (1865), L. R. 1 Q. B. 115, 125.

(*l*) (1881), 7 P. D. 1, at p. 4.

Brett, L. J., said: "If this ship had been an English ship, if the captain had been an English master, and if the owners of the cargo had been English subjects, there is no doubt that the master would have had no authority to bind the owners of the cargo unless certain necessities had arisen. The ship must have been in a state of distress, and in a port of distress where the owner of her had no means or credit by which to find the money required for doing the necessary repairs; and besides this, in order to require the hypothecation by bottomry of the cargo, the value of the ship must not of itself be large enough. Moreover, if this had been an English ship, and an English captain, even though all these necessities had existed, yet the master would not be authorized to charge the cargo if before doing so he had the means of communicating with the owner of the cargo within a reasonable time, so that on receiving notice the owner of the cargo might determine whether he would allow the cargo to be bottomried, or whether he would take other means for the disposal of the cargo. Therefore, if this had been an English ship, there can be no doubt but that the cargo of the defendants would not, on the facts pleaded in this case, have been liable, because it is admitted that before hypothecating the cargo a communication might have been made by the captain to the cargo-owners" (m).

The learned judge then proceeded to consider whether this rule must bind an Italian ship. This must depend, he said, on the nature of the thing to be proved. Now this was not a question of procedure, to be governed by the *lex fori*. Nor was it a question concerning the terms of the contract, to be governed by the law of the *lex loci contractus*, for the master had no power under the contract of carriage to deal thus with the cargo.

"What," he said, "is the nature of that which has to be proved? It is the authority of the master. . . . This authority of the master of the ship to hypothecate the ship or cargo is peculiar. It does not arise merely out of a contract of bailment, for that contract gives no such right. It does not arise even out of a contract of carriage on land. I doubt whether it arises on a contract of sea carriage, where it is all within the realm, but it is not necessary

that this should be now decided. It does arise where goods are shipped on board a ship to be carried from one country to another. That is acknowledged by the maritime law of England, and, as far as I know, is equally acknowledged in every maritime country. It arises from the necessity of things; it arises from the obligation of the shipowner and the master to carry the goods from one country to another, and from its being inevitable from the nature of things that the ship and cargo may at some time or other be in a strange port where the captain may be without means, and where the shipowner may have no credit because he is not known there, that for the safety of all concerned, and for the carrying out of the ultimate object of the whole adventure, there must be a power in the master not only to hypothecate the ship but the cargo. That power of the master does not arise out of the bill of lading nor out of the charter-party, because it may exist where there is neither bill of lading nor charter-party. It arises out of the contract of maritime carriage, by the shipment of goods on board a ship for the purpose of being carried from one country to another, and it exists the moment the goods are put on board for such a purpose. It is regulated, and often limited, by terms in the bill of lading or by terms in the charter-party; but unless such terms specifically do away with this authority of the master, the authority of the master exists by virtue of the contract which arises between the shipowner and the cargo-owner by the shipment of the goods. It is not necessary to decide whether this authority is given to the master by way of contract or by means of the law.

“Then what is the principle which ought to govern this case? The goods are put on board an Italian ship, and the person to exercise authority is an Italian master. Is the authority of the Italian master to depend upon the law of the country of the shipper, when that law is contrary to the law of his own country? Why should it? Is the master of a ship to be taken to know the law of the country of each shipper of the goods which are put on board his ship? It would be strange if that were so. If a merchant puts his goods into the power of an Italian master on board an Italian owner's ship, what is the meaning of the transaction but that he is to deal with the goods as an Italian master is to be taken to deal with goods on board his ship, unless he is bound to another mode? Upon principle it seems to me that he who ships goods on board a foreign ship, ships them to be dealt with by the master of that ship according to the law of the country of that ship, unless there is a stipulation to the contrary. Therefore, when these goods were

shipped on board the Italian ship, it seems to me that by the contract of the parties arising out of that shipment it must be taken that the goods were to be dealt with under circumstances which might arise, and which are generally considered likely to arise by all maritime countries, in the way in which that master would deal with the goods according to the law of Italy, unless there was some stipulation to the contrary. Now that is how it stands on principle. How are the authorities? The case of *Lloyd v. Guibert* (*n*) does not seem to me to govern this case absolutely, because the question there was whether or not a certain stipulation was implied in a contract. The contract was a contract of affreightment, and the question was whether there was to be implied into that contract a stipulation that if certain circumstances arose, and the master delivered up his ship and freight, the shipowner should not be made liable beyond the amount specified. The owner of the ship could only be relieved if there was such a stipulation in the contract of affreightment. There would have been no such stipulation if it was to be judged according to the law of the former, that is, the law of the English court. But there would be such a stipulation if the contract of affreightment was to be construed according to the law of the ship. It was there held that inasmuch as the contract of affreightment was made with the master or owner of a foreign ship abroad, the contract was the contract of the country of the ship; in other words, that it was governed by the law of the 'flag' of the ship; and inasmuch as, in the country of that flag, such a contract of affreightment would have had such a stipulation in it, then the English court would hold that it had this stipulation in it. That is not this case, because the matter here is not the question of the construction of a contract, but of what authority arises out of the fact of a contract having been entered into. Still, if the contract was held there to be a foreign contract because it was made with regard to the shipment of goods on board a foreign ship, the principle governs this case, and would authorize our saying that the authority which arises out of the contract of shipment is the authority which the law of the country of the ship would give to the master; and in accordance with that principle I think this case ought to be decided. The learned judge of the Admiralty Court considered that this case was governed by *The Hamburg* (*o*), but with great deference I do not think that that case ought to govern the present one at all. There Dr. Lushington treated the ship as an English ship, and said that he was administering the maritime law of England. It was

(*n*) (1865), L. R. 1 Q. B. 115.

(*o*) (1864), Br. & Lush. 253.

urged upon him that he ought to administer some other maritime law, but his answer was, 'I do not judge what it should be, if there had been any evidence before me that the maritime law of some other country was different from the law of England, but no such evidence has been given before me in this case.' This point, therefore, did not arise there, and neither Dr. Lushington, nor the Privy Council on appeal, decided, if the law of the countries had been different in the case of *The Hamburg*, which law would have been administered. I cannot, therefore, think that the case of *The Hamburg* is in conflict with the decision to which I have come in the present case, nor in conflict with the case of *Lloyd v. Guibert*. Therefore, acting upon the principle of *Lloyd v. Guibert*, and upon the principle which arises from the mercantile transaction itself, it seems to me that whoever puts his goods on board a foreign ship puts them on board subject to be dealt with by the master according to the law of the country to which the ship belongs, unless that authority is limited by express stipulation between the parties at the time of the shipment.

"There was another and a minor point taken, which was that, if that be the law, yet it was not the law to be administered in this case, because the contract of affreightment here was actually made in England. But that makes no difference in my view of the case; the right arises out of the contract which is instituted by the shipment, and which is not controlled in this respect by any stipulation in the bill of lading or in the charter-party. I am, therefore, of opinion that the demurrer in this case ought not to have been allowed, and that the rights of the parties ought to be decided according to the law of the flag" (*p*).

Cotton, L. J., concurred. "The point," said his lordship, Cotton, L. J. "turns not on the express terms of any contract, but, in my opinion, on an implied authority arising out of the contract between the owners of the cargo and the owners of the ship when the goods were put on board for the purpose of being carried; and, like all other implied terms, it must be governed by the law applicable to the country in which it is implied. . . . We are here not considering what is the proper remedy, but whether the bottomry bond is valid or not" (*q*).

It must now, then, be taken as settled that all

(*p*) (1882), 7 P. D. 137, at p. 145. judgment of Sir James Hannen in
 (*q*) *S. C.*, at p. 148. See also the *The August*, [1891] P. 328.

questions affecting the validity of a bottomry bond on cargo must be determined with reference to the law of the country where the ship is owned. Were it not that, from the causes already pointed out, this species of security is rapidly falling into disuse, it might be necessary to say much more concerning bottomry in connection with the subject of general average. As it is, I think I may content myself with referring my readers to the many works on the special subject of bottomry, and particularly to the very learned work of Dr. Franck, *De Bodmeriâ*, in which are set forth, in the original, and with a translation into Latin, the laws of the principal states of Europe and America on this subject^(r).

Practically, at the present day, all that a shipowner, merchant, or underwriter needs to know concerning bottomry, or these forced sales of cargo, for the most part, is, that they are very serious evils which, at least if he ships in British bottoms, it is almost always in his power to avoid. The master of such a vessel cannot bottomry his cargo, and probably cannot sell it to raise money, without giving timely notice both to the shipowner and to the owner of cargo; and it now rarely if ever happens that there is not time to send out the requisite funds, accompanied, in case of suspicion, with some trustworthy person to superintend the disbursing of them. The expense of doing this, including a rate of interest just sufficient to place all parties in a position of ultimate equality, so that no one should either wish, or shun, to advance more than his share, should be charged as a pendant to the capital expenditure itself, so as to bring about the result so clearly described by Arnould in the passage above cited^(s).

^(r) *De Bodmeriâ*: Franck. London, W. Maxwell, 1842.

^(s) *Ante*, p. 326, n. (*f*).

PART II.—*Sacrifices.*

§ 67. (a) Sacrifices of cargo may be treated under the single head of jettison; since, so far as concerns the amount to be replaced, every kind of sacrifice of cargo must be treated on the same basis as a jettison: if the cargo is destroyed for the common good, the amount to be replaced is the same; if it is only damaged, the sum allowable is the difference between the actual proceeds and the amount allowable in the case of jettison (*t*); so that, in dealing with the case of jettison, we shall have disposed of all sacrifices of cargo. There will remain only, for the second section of this chapter, sacrifices of ship's materials.

SECTION 1.—JETTISON OF CARGO.

The principle which regulates the amount to be made good in case of jettison is this: The owner of the goods jettisoned is to be so compensated that he shall be in the same position, at the time and place of adjustment, as if, not his goods, but those of some other person, had been thus sacrificed (*u*).

General principle, for sacrifices of cargo.

The time and place of adjustment, as we have seen, is the termination of the common adventure; that is,

(*t*) In practice the amount allowed to an owner of cargo damaged by a general average sacrifice is frequently, where the adventure is completed, the difference between the gross sound value of the goods and their gross value in their damaged condition, plus any extra charges incurred in consequence of the goods having arrived damaged. Should the cargo-owner have been saved any charges, owing to the goods having arrived damaged, the amount thus saved must be deducted from the allowance in general average.

(*u*) To give full effect to this principle, interest ought to be allowed to the owner of cargo sacrificed from the time of the termination of the adventure until he actually received the amount made good to him. Otherwise he is not put on an equality with the shipowner, who has had the use of his ship during this time, and the other owners of cargo, who received their goods when the vessel arrived. In practice, however, such interest is never allowed in this country.

generally speaking, the arrival of the ship and cargo at the place of destination; but, sometimes, the time and place of wreck (*x*).

Rule for obtaining equality of contribution.

It may be pointed out once for all, as applicable not only to jettison but to all kinds of general average, that the equality of contribution, as between those whose property has been sacrificed and those whose property has been preserved, is attained by a simple contrivance, universal in the practice of adjusting averages. The amount made good in respect of property sacrificed is brought in as contributing rateably with the property preserved: so that the former pays the same proportion of general average as the latter.

Rule in case of arrival.

Whenever, then, after a jettison, the ship and remaining cargo reach the port of destination, the amount to be replaced in general average is, the net market value of the goods thrown overboard (*y*): that is to say, the sum which those goods would have fetched had they been sold immediately upon delivery; deducting therefrom those expenses which must have been incurred by the proprietor, and which he escapes by reason of the non-delivery of his goods (*yy*). Hence the freight, if payable at the port of destination, or if the payment is made conditional upon the delivery of

(*x*) See *ante*, Ch. VI.

(*y*) It is, however, said, that if jewels, or other valuables, are described in the bill of lading as articles of inferior value, they are to be contributed for as of such inferior value. (See Benecke, 294; Arnould, 2nd edit., p. 947; 8th edit., § 981; Code de Com. Art. 418; cf. *Lebeau v. Gen. Steam Nav. Co.* (1872), L. R. 8 C. P. 88.) So also, according to the Laws of Wisby and some of the older writers, if valuables are packed in a box without any intimation to the master of their value, they shall

be contributed for only upon the value of the box, or of the goods the master might reasonably suppose it to contain. (See Arnould, *ubi supra*.) Phillips, however, considers that if the omission to give notice of the contents of the box was not due to the fault or negligence of the shipper, the contribution should be for their value. (Phillips, § 1372.)

(*yy*) When sacrificed goods are replaced at the port of loading, the amount allowed in practice is the actual cost of replacing them.

the goods, must be deducted: so must the expenses of landing and sale: but not the cost of marine insurance, since this, if incurred at all, must be incurred whether the goods are jettisoned or not (*z*).

The market value at the date of discharge is in all cases the basis of compensation. If the cargo has been sold afloat, or "to arrive," the loss which the merchant actually sustains by the jettison is, the price at which it was thus sold: but, as such a speculative sale beforehand is a thing with which the other owners of property have no concern, such sales "to arrive" are disregarded; and, whether the goods have been sold afloat at a higher or a lower price than the eventual market value, it is the latter which is made the basis, both for compensation and for contribution (*a*).

Sales
"afloat" or
"to arrive"
disregarded.

The owner of the ship, who loses his freight on the goods jettisoned, must be compensated in general average for this freight, as the owner of the goods is for his merchandise.

Freight on
jettison.

If the goods jettisoned had previously been damaged, or if, though not damaged at the time, it can be proved that, had they remained on shipboard with the rest of the cargo, they must inevitably have suffered damage before reaching their destination, the amount to be made good is to be reduced to their value in the damaged state (*b*).

Rule when
jettisoned
goods are
damaged.

(*z*) The merchant's commission is not deducted, for another reason. "That is not payable when the consignee is the owner of the goods, and is usually charged on jettisoned goods by the consignee when he is not the owner, and therefore is not deducted in estimating the loss to be allowed in general average." (Bailey, Gen. Av. 135, n.)

been the practice amongst adjusters, is confirmed by the Court of Appeal in *Rodocanachi v. Milburn* (18 Q. B. D. 67, at p. 76). This was an action against the shipowner for non-delivery, but the principles laid down by Lord Esher, M. R., are equally applicable to the case of general average. (See per Gorell Barnes, J., in *The Leitrim*, [1902] P. 256, 267.)

(*a*) This, which has for many years

(*b*) *Ante*, pp. 42, 43. On the

In carrying out this principle, it is to be borne in mind that the owner of goods jettisoned has a *primâ facie* claim to their value in a sound state; consequently, the burden of proof rests with those who wish to admit a lower value; and the allowance must not be reduced except upon clear proof that the damage either actually existed, or, if in the future, that it was, not merely probable, but inevitable. In practice, therefore, when the goods were sound at the time of jettison, and when the cargo arrives partly sound and partly damaged, so that it is doubtful whether the goods jettisoned would have been damaged or not, they are treated as if sound (*c*).

Effect of subsequent accident.

If, again, after a jettison, there is some accident, the effect of which is to throw upon the cargo an expense, which would in like manner have fallen upon the goods jettisoned, had they remained on board, there must be a deduction from the allowance for jettison, corresponding to the expense which it has escaped (*d*). This rule, the equity of which is self-evident, is in practice always observed when the expense is considerable. It is sometimes neglected or omitted when the expense in question is small. For example, when a jettison is followed by the ship's putting into a port of refuge, where the cargo is discharged to repair the ship, most adjusters, although they would make the jettisoned cargo contribute towards the expense of discharging, as well as towards the remainder of the general average,

same principle, if the goods jettisoned were subject to leakage or breakage, allowance ought to be made for the ordinary leakage or breakage in estimating their value. (2 Phillips, § 1366; 2 Arnould, 8th edit., § 981.)

(c) Bailly, Gen. Av. p. 137, n.

(d) On this principle, if salvage charges are subsequently incurred, a deduction is frequently made in practice from the amount to be made good for a general average sacrifice, of the estimated proportion of the salvage which the interest sacrificed would have been liable to pay.

make no deduction from the allowance for jettison on account of the warehouse rent at the port of refuge, which those goods, if not jettisoned, must have borne. This is plainly wrong in principle: the effect being that, to this extent, the goods jettisoned are better off than the remainder.

Such are the rules for computing a jettison, when the cargo reaches its port of destination. When the voyage is terminated by a wreck of the ship, and when, in consequence, the average is properly adjusted at some place other than that of destination, the allowance for jettison must be regulated by the value of the cargo at that place. That this is the rule must now, since the decision in *Fletcher v. Alexander*, be taken to be settled law (*e*). The extent and operation of this rule has been sufficiently explained in the preceding chapter.

When a jettison is followed by a total loss of ship and cargo, there is of course no allowance in general average. When it is followed by a wreck with partial salvage, the sum allowable for jettison is, so much as presumably would have been saved had the jettisoned goods been left on board and shared the fortunes of the remainder (*f*).

[Where goods which have been jettisoned have been recovered, the amount of the contribution is the damage done to them, together with the expense of recovering them; and if they have already been contributed for in full, the balance must be refunded (*g*).]

The same principles apply to the allowance for loss of freight consequent on a jettison. If, after the jettison, the ship is wrecked or condemned at a port of refuge,

Loss of
freight by
jettison.

(*e*) (1868), L. R. 3 C. P. 375; *ante*, p. 293.

(*g*) Arnould, 2nd edit. p. 947; 8th edit. § 981.

(*f*) *Ante*, pp. 42, 43.

and the cargo is forwarded to its destination in another vessel, the sum allowable for freight of jettison is, the freight under the original bill of lading, *minus* the forwarding freight which would have been incurred. If the hire of the forwarding vessel equals or exceeds the original freight, nothing is allowable to the shipowner in general average; since in such a case the jettison has occasioned no loss of freight.

Freight taken
to fill up.

If, after a jettison, the ship puts into a port of refuge, and there takes in fresh cargo in the space left vacant through the jettison, the new freight thus earned must go in diminution of the shipowner's claim for loss of freight. It would be otherwise if the ship were not full at first, so that the new cargo might equally have been received on board had there been no jettison (*h*).

When the
freight is
prepaid.

If the freight has been absolutely prepaid, the sum to be allowed for the jettison is the same on the whole: but, instead of being divided between the merchant and the shipowner, the merchant receives all; there being no deduction in respect of freight from the value of the goods, and no allowance to the shipowner, who in that case has suffered no loss of freight by reason of the jettison.

When the
ship is char-
tered.

When a ship is chartered for a lump sum, irrespective of the quantity of cargo she may carry, the courts will generally, if not always, consider this payment, not as freight properly speaking, but as a sum paid for the hire of the ship; so that, if the ship performs her voyage, and arrives, whether fully laden or partially empty, the entire lump sum stipulated is payable (*i*). Under such a charter, therefore, no deduction in respect of freight is to be made from the cargo owner's claim for jettison.

(*h*) Bailly, Gen. Av. p. 134.

(*i*) *The Norway* (1865), Br. & Lush. 404, 408.

A complication arises, when a ship is chartered at a certain rate per ton or per pound weight of cargo delivered, and then, instead of being laden by the charterer with goods of his own, is sub-let to shippers under bills of lading at lower rates. A jettison in this case causes a loss to the shipowner of the higher rate of freight: while the only deduction which the owners of the goods jettisoned can submit to, is the lower rate named in the bill of lading, since that is all which they escape through the jettison. Thus, if compensation is to be made to both these parties, the total sum allowable in general average would be more than the entire value of the goods jettisoned.

When chartered ship is sub-let.

The practice in this case is, to limit the allowance in general average to the actual value of the goods: and, as the owners of the goods are entitled to receive the value of them, *minus* the bill of lading freight only, it is only this lower rate of freight which is allowed in general average.

When a ship is sub-let in this manner, the charter is a matter with which the owners of the cargo have no concern: their contract is the bill of lading; their rights and liabilities, in respect of general average, should be the same as if no charter existed (*k*). Such a charter is, therefore, for all purposes connected with general average, as completely disregarded, and properly so, as a sale of cargo “to arrive.”

SECTION 2.—SACRIFICES OF SHIP'S MATERIALS.

(b) When a ship's masts have been cut away, or other articles constituting a part of the ship or her apparel have been sacrificed, and when the ship is afterwards

Measure of damages.

(*k*) Bailly, Gen. Av. p. 132. See also per Gorell Barnes, J., in *The Leitrim*, [1902] P. 256, 267.

repaired, the sum allowable as compensation for this damage is, the cost of repairing it, with a deduction for the advantage which the owner derives from having new work in place of old.

The cost of repairing such damage must be taken to be the cost of repairing it at the time and place where it ought to be repaired. Should it be necessary for the ship, after the sacrifice, to go into some port of refuge, and there repair this damage, the cost of repairing at that place, however expensive it may be, is the sum allowable. Otherwise, the cost of repairing at the place of destination, and at the time of the ship's arrival, is to be taken, provided the repair either is or ought to be effected then and there. It may happen, however, that from motives of economy, the master delays repairing until he shall reach some cheaper place: in which case, under ordinary circumstances, the sum allowable must be reduced to the actual cost at the place he thus selects for the purpose. These rules are founded on the principle, that the owner is entitled to no more than compensation for his actual loss, and that he is bound to do what is reasonable to make that loss as light as may be (*l*).

Deduction of
one-third.

The deduction for improvement is, by an ancient and wide-spread custom, prevailing amongst almost all maritime communities, fixed at one-third of the cost of repairs, with certain equally well-defined exceptions. Anchors are allowed in full: chain cables are subject to one-sixth only: and there is no deduction for provisions or such stores as are of a nature to suffer no diminution of value from mere lapse of time (*m*).

(*l*) Baily, Gen. Av. p. 130.

(*m*) The deduction for new metal sheathing is computed by allowing so

much of the cost as represents the weight of metal stripped off, and charging the excess to the shipowner.

Materials which are perfectly new when sacrificed, such as coils of rope which are taken from a store-room, or spare sails which have never been bent, are allowed without deduction.

This rule of deducting one-third, without discriminating between those parts of a ship where the adding of a new patch is no improvement whatever, and those which, like the sails and ropes, require frequent renewal; and, again, drawing no distinction between articles nearly new and articles nearly worn out; is evidently a very rude contrivance, and there is nothing to be said in its favour, except that it saves trouble and disputes.

Objections to this rule.

A gross example of its injustice and even absurdity is furnished, when a ship, after her masts have been cut away, is on that account obliged to put into a port of refuge, where, owing to high prices or want of appliances (*n*), the cost of new masts is greatly in excess of their cost at the home port. This is an every-day case: and it by no means unusually happens that the cost of repairing at such a place is double or treble the cost in England, so that the shipowner may be called on to pay, for the supposed advantage of having a new mast in place of that which he had before, as much as the entire cost of a new mast.

Nor is this all. It frequently occurs, in such cases, that the cost of repairing is enhanced by the addition of bottomry premiums or commissions for advancing money. Our practice goes so far as to deduct one-third from these incidental expenses; though nothing is more evident than that a mast is not made more valuable by the cir-

(*n*) A case came under my notice, where a large part of the cost of a mast at such a port consisted of the expense of an expedition into the woods, to select and cut down a suitable tree.

cumstance that a bottomry premium has been paid on the cost of supplying it (*o*).

The deduction of one-third is made from labour as well as materials. No deduction is made from temporary repairs; nor from such repairs as, being unavoidably of such inferior materials or bad workmanship as to be unfit for the ship, must be replaced at the end of the voyage, and consequently add nothing to the ship's permanent value.

No thirds on first voyage.

To the rule of deducting one-third there is in this country (*p*) an important exception. No deduction is made from the repair of a ship which is on her first voyage. The first voyage means, her first entire trading adventure. A mere passage, in ballast, or with cargo to serve as ballast, from the place of building to the place where she enters into her owner's service and commences her mercantile existence, is not accounted either as a voyage or as part of a voyage. A ship may be built in Canada, and sent for sale to England, with a cargo of timber; and she is then entitled to commence her first voyage, from London or Liverpool, as a new ship. It has been decided in the courts that such first voyage is generally to be taken as a voyage out and home: that is to say, in the case of a ship intended to trade to foreign parts, taking cargoes out and bringing cargoes home, the passages out and home constitute one entire voyage (*q*). It is not necessary that she should go out and home direct, nor that her engagements for the entire voyage should be predetermined at the time of sailing out.

(*o*) No thirds are deducted from such incidental expenses as cartages, or the cost of conveying materials for repair from the place where they are bought to the ship.

(*p*) It is not so in the United States. Thirds are taken off there, though the ship be on her first voyage. (2 Parsons, Ins. 286; Phillips, Ins. § 1431.)

(*q*) *Fenwick v. Robinson* (1828), 3 C. & P. 323.

Where a ship was chartered for a voyage from London to Port Jackson and Van Dieman's Land, with convicts; and, after completing her charter, being unable to procure a homeward freight from Van Dieman's Land, she went in ballast to Madras, and took in freight for England, which was proved to be a customary course for ships so chartered; she was held to be on her first voyage until her arrival in England (*r*).

If there is a new mast in an old ship, or if any other portion of the ship has been renewed immediately before sailing on the voyage, and if this new mast or other new work is sacrificed, should the one-third be deducted? This is a disputed point. As a matter of equity, it would seem that no deduction should be made, at any rate when the ship puts back to her loading port, since in this case the owner derives no advantage whatever from the renewal of work which was new before. The present practice is, to make no deduction in the case of metal sheathing, when the ship returns to her starting point, having been newly sheathed before sailing; but in the case of all repairs except sheathing, the more general, though I believe not the universal, practice is to deduct one-third. This distinction seems plainly untenable; and it would probably be better that all replacing of work actually new at the commencement of the voyage should, upon clear proof of the fact, be allowed without the deduction (*s*).

Replacing
new parts of
an old ship.

(*r*) *Pirie v. Steele* (1837), 2 M. & Rob. 49; 8 C. & P. 200.

(*s*) Arnould (2nd edit. p. 1000; 8th edit. § 1028) says that a case of this kind can rarely, if ever, occur; unfortunately, it does in fact arise very often. It is sometimes argued that the point is settled by the de-

cision in *Poingdestre v. Roy. Exch. Co.* (1826), Ry. & M. 378. In that case, however, the work replaced was partly new and partly old, and the ship did not return to her starting point, but had made a voyage; besides which, that was a question of particular average under a policy of

With regard to iron or steel ships, a deduction of one-third new for old would undoubtedly be excessive, at any rate from the iron or steel portion of the repairs. For many years it has been the all but universal custom to insert special clauses in policies of insurance on such ships, doing away to that extent, or entirely, with this deduction. This, however, of course cannot affect the general average, as between the shipowner and owners of cargo. Hence there has been this anomalous result, that the underwriters of ships insured with these clauses have, in the case of general average repairs, been called on to pay, in addition to the ship's proportion in full, the unrecovered one-third of the cargo's and freight's proportion. To remedy this, as well as for the sake of remedying an obvious flaw in the law of general average, the Adjusters' Association appointed a special committee to make inquiry into the subject and report to the Association, and in accordance with their recommendation the following rules were adopted in 1887 and confirmed in 1888:—

Rules
adopted by
Adjusters'
Association.

“Deductions from cost of repairs to iron vessels in adjusting general average.

That in adjusting claims for general average, repairs to iron vessels shall be subject to the following deductions in respect of ‘new for old,’ viz.:—

From date of original register.

<i>Up to</i>	{	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
<i>1 year old</i>		
(<i>A.</i>)		

insurance, and it may be that questions of general average should be determined on principles of broader

equity than questions arising out of a contract with underwriters.

Between
1 & 3 years
(B.)

One-third to be deducted off repairs to and renewal of boilers and their mountings, woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers and painting.

One-sixth to be deducted off wire rigging, ropes, and hawsers, chain cables and sheets, donkey engines, steam winches, steam cranes and connections; other repairs in full.

Between
3 & 6 years
(C.)

Deductions as above under Clause B., except that one-sixth be deducted off ironwork of masts and spars, and machinery other than boilers.

Between
6 & 10 years
(D.)

Deductions as above under Clause C., except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery and all hawsers, ropes, sheets and rigging; one-sixth to be deducted off chains and cables.

After
10 years
(E.)

One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing. Anchors to be allowed in full.

One-sixth to be deducted off chain cables.

Generally
(F.)

The deductions (except as to provisions and stores, machinery and boilers) to be regulated by the age of the vessel, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use."

When the injury to the ship, whether caused by the sacrifice alone, or by that conjointly with accidental damage, is so extensive that she is not worth repairing, and is therefore sold, the allowance in general average is not, necessarily, the estimated cost of replacing the articles sacrificed. We are in that case to enquire

Rule when
the ship is not
repaired.

whether or no the sacrifice was that which caused the loss of the ship. If the accidental damage, apart from the sacrifice, would have sufficed to condemn the ship, all that can be allowed by way of compensation for the sacrifice is, the difference between the sum which the ship would have fetched, other things remaining the same, had the sacrifice not been made, and the sum which she actually fetched. This difference is all which the shipowner has really lost by the sacrifice. If, on the other hand, it is the damage done by the sacrifice which has turned the scale; that is to say, if the ship in spite of all her previous accidental damage, would have been worth repairing, and would have been repaired, but for her masts having been cut away, or some similar sacrifice made for the general safety; then the amount allowable in general average for this sacrifice is the value of the ship [before the damage]—with her net freight, in case this be lost by the sale of the ship—*minus* the estimated cost of repairing the accidental damage [and the net proceeds of the sale]: this difference being, in the case supposed, the measure of the shipowner's actual loss through the sacrifice (*t*).

(*t*) *Henderson v. Shankland*, [1896] 1 Q. B. 525 (C. A.). In this case the Court of Appeal also held that no deduction in respect of thirds was to be made from the estimated cost of the particular average repairs. This part of the judgment is criticized by Mr. Carver (§ 422, n.), who points out that the endeavour was to ascertain what the ship was worth after the particular average damage, and before the general average sacrifice. "For this purpose," he says, "the undamaged value of the ship was taken as the basis of the calculation. But the particular average repairs if

done would have *added* to that original value. That is the theory of the custom to deduct thirds. Thus the cost of the particular average repairs was not a measure of the depreciation from the undamaged value, but a measure of the depreciation from the repaired value. Hence, either the repaired value should have been taken as the basis of the calculation, or the deduction of thirds should have been made from the estimated cost of the particular average repairs." A simple illustration will show the justice of this criticism. If the undamaged value

of the ship was 12,000*l.*, and the estimated cost of the repairs is 3,000*l.*, the expenditure of that sum would, it is assumed, enhance the value of the ship to the extent of 1,000*l.* If therefore the ship would by spending 3,000*l.* be made worth 13,000*l.*, her value in the damaged state is 10,000*l.* The thirds have in this calculation been added to the undamaged value; but the result would, of course, be the same if they had been deducted from the estimated cost of the repairs.

The main ground of the decision in *Henderson v. Shankland* was, that the deduction of thirds is not made in considering whether there is a constructive total loss. In cases of

constructive total loss, however, the question is a different one, viz., whether the cost of repairing the ship would exceed her value when repaired. (Marine Insurance Act, 1906, s. 60, sub-s. 2 (ii).) The undamaged value is not the basis of the calculation, and there is, therefore, no analogy between these cases. Another reason stated by Lord Esher, M. R., for not allowing the deduction was, that no one got any benefit from the repairs, as they were not executed, to which Mr. Carver replies, that the calculation to be made was simply of the ship's value at a particular time, not of the gain or loss to any one by repairing.

CHAPTER VIII.

CONTRIBUTING INTERESTS AND VALUES.

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To complete that portion of the subject which refers to the mode of adjustment, nothing now remains but to consider in what manner the contribution is to be levied: that is to say, what interests are to contribute, and on what values.

General prin-
ciple.

§ 68. The principles which regulate this have for the most part been already dealt with; for it may be stated generally that the basis for contribution for property which is saved is the same as the basis of allowance for property which has been sacrificed.

The general principle of contribution may be summed up in one sentence: it must be determined how much better off, in a pecuniary sense, each owner of property exposed to hazard on shipboard would be in the event of a safe arrival than in the event of a total loss: and on

this amount, which represents the benefit derived by each from the sacrifice which has saved the ship, each must contribute.

The shipowner has saved, at all events, his ship, and perhaps also his freight.

§ 69. The first contributing interest, then, is the ship. This must contribute upon its actual value to the owner, at that point of time which, according to the rules already laid down, is to form the basis of adjustment, and in the actual condition, whether sound or damaged, in which the ship was at that time. Value of ship.

To determine the actual value of a ship is not always very easy. On principle, a merchant-ship being simply a machine for earning freights, the real value of a ship to her owner is, the present capitalized value of all her future earnings, so long as she can be used as a ship, after deduction of her working expenses; to which must be added, the present value of the sum for which she may eventually be sold to be broken up. But, as the data for such a calculation do not exist, we have to adopt other tests, in the way of approximation. One such test is the value in the market, which represents the current opinions of shipowners on the point. This test can be adopted when there is a market for ships of the kind, sufficiently extensive to give a fair approximation to the ship's real value. In the case of ships of a peculiar build, or exceptional size, or having qualities which specially adapt them to some one limited trade, the value in the market may not come near to the real value. In such a case it may be necessary to take account of the first cost; to make a deduction for age and wear and tear; to allow, likewise, for changes that may have taken place, since the ship was built, in the cost of materials

or the price of labour, or for later improvements in construction which may diminish her relative value. In short, no inflexible rule can be laid down beyond this: the principle is, the ship is to be valued at that sum for which the owner as a reasonable man would be willing to sell her: and this sum must be ascertained by the adjuster as well as he can (*a*).

Deductions to
be made from
value of ship.

The deductions to be made, in certain cases, from this value are to be regulated by the principle, above laid down, that the owner of the ship is to contribute in respect of the benefit he has derived from his ship having been saved instead of being totally lost. If she is saved in a damaged condition, the necessary cost of repairing her is to be deducted from her value when repaired. This must be done in all cases, when the damage has taken place previously to the general average act, and has not, up to that point, been repaired. When the damage has taken place subsequently to the act, the question whether the cost of repair is to be deducted from the value must depend on whether the basis of adjustment is to be the value at the end of the voyage, or the value at the place where the general average expenditure is incurred. On principle, as has been seen, a distinction should be made in this respect between the case of a sacrifice such as a jettison, and that of expenditure incurred at an intermediate port. In the former case, the values at the end of the adventure being the basis, the whole cost of repairing should be deducted: in the latter, only so much as represents damage done previously to the incurring of the expenditure. In practice, the opinions of adjusters are divided; but the

(*a*) See *African Steamship Co. v. Swanzy* (1856), 2 K. & J. 660; *See also The Harmonides*, [1903] P. 1.
Grainger v. Martin (1862), 4 B. & S.

majority incline to the deduction of the entire damage in all cases.

What is here said as to the deduction for damage to a ship applies equally to the case of damage to cargo.

To the value of the ship, thus determined, with this deduction, must be added, on the principle already laid down (*b*), any amount allowed in general average for damage done by a sacrifice for the common safety.

§ 70. The rules for the valuation of the cargo have been laid down by anticipation, in defining the amount to be made good for a jettison. Value of cargo.

The cargo is to contribute on its market value at the date of delivery, or at the time and place which form the basis of adjustment, deducting therefrom such expenses as the merchant must incur in the event of delivery and will escape in the event of total loss; that is, the discount, freight, landing and warehousing charges, duty, and brokerage (*c*). The cost of marine insurance is not to be deducted: nor, for the reason above given (*d*), the commission payable to a consignee. Sales afloat are disregarded, as speculations which cannot affect third parties. If the goods are damaged, it is the value in the damaged state, only, which contributes; subject to what was said above with reference to damage suffered subsequently to the incurring of the general average expenditure (*e*).

When the average is adjusted at the port of loading, and on the state of facts then subsisting, the value of the cargo at the port of loading must form the basis of con-

(*b*) *Ante*, p. 336.

Lines (1900-2), 102 Fed. R. 184;

(*c*) Salvage or particular charges payable in respect of the goods should also be deducted. (*The Eliza*

114 Fed. R. 307; Carver, § 419.)

(*d*) *Ante*, p. 337.

(*e*) *Ante*, p. 300 *et seq.*

tribution. This value is in practice usually taken to be the invoice cost of the goods, which for ordinary purposes is a sufficiently close approximation; though in the event of a change in the market between the date of purchase and the date which should form the basis of adjustment, the invoice cost would not represent the real value of the goods at the time (*f*).

Freight.

§ 71. Besides the ship and the cargo, the freight must contribute to the general average.

Under bills of lading.

Under ordinary circumstances, when the goods are shipped under a bill of lading, and the payment of the freight is conditional upon the arrival and delivery of the cargo, it is clear that the rescuing of the ship and cargo from total loss confers upon the shipowner an advantage, in excess of the value of his ship, to the extent of the amount of freight earned, *minus* those expenses of earning it which would have been saved had the ship been lost. This difference represents the contributory value of the freight in such a case (*g*).

Prepaid freight.

If the freight has been absolutely prepaid, or has

(*f*) In *Fletcher v. Alexander* (1868), L. R. 3 C. P. 375, where the adventure was broken up at the port of loading, the condition of the cargo being such that it could not be carried to its destination, the judges were unanimously of opinion that the contributory value of the cargo was the sum which it would realize.

Arnould lays down the rule that where the adjustment is made at the port of loading, the contributory value of the goods is their cost on board, *i.e.*, the amount of the tradesmen's bills and shipping charges. (Arnould, 2nd edit. p. 957; 8th edit. § 990.) The inclusion of the shipping charges cannot, however, be justified

where the voyage is broken up, for the value of the goods when they are re-delivered to the shipper at the port of loading has not been enhanced by the payment of the shipping charges.

(*g*) See per Gorell Barnes, J., in *The Brigella*, [1893] P. 189, 196. No. 32 of the Rules of Practice of the Association of Average Adjusters provides that the freight is to contribute upon its gross amount, deducting such port-charges as the shipowner shall incur after the date of the general average act, and such wages of the crew as he shall become liable for after that date.

been made payable independently of the ship's loss or safety, then the advantage derivable from the performance of the voyage is transferred from the shipowner to the owner of the goods. The value of the goods is increased by the amount of freight paid on them. In such a case, then, the shipowner does not contribute in respect of the freight: the freight is not deducted from the market value of the goods, when that is the basis of contribution; and, if the goods are made to contribute on their invoice cost (*h*), the advance freight must be added to it (*i*).

If, indeed, the general average is adjusted at the port of loading because the ship is wrecked or condemned there, so that in result the owner of the cargo derives no advantage from having pre-paid the freight, the advance freight does not contribute at all. For, in such a case, the advance freight is really lost. The ground of its contributing is, that the goods are more valuable to the owner of them when he has purchased for them the right of being carried in the ship freight free: which is only true when the goods are or can be carried in the ship (*j*).

If the cargo (*k*), or any part of it, belongs to the owner of the ship, its value at the port of destination is of course the same as if similar goods had belonged to some one else. At any point of the voyage, then, where

Cargo belonging to shipowner.

(*h*) Such a case is only likely to arise, where the adjustment is based on the values at the port of destination, when there is no market for the goods in question.

(*i*) It is sometimes found convenient to keep separate the contribution of the cargo and that of the advance freight; but this is merely done for the convenience of settlement with underwriters. It is the

owner of the cargo who pays for both.

(*j*) *Fletcher v. Alexander* (1868), L. R. 3 C. P. 375.

(*k*) See the judgment in *Montgomery v. Indemnity Mutual Marine Ins. Co.*, [1902] 1 K. B. 734 (C. A.), *post*, p. 359, n. (*g*), with reference to the position when all the property at risk belongs to the shipowner.

the value of such goods has to be determined for the purpose of contribution, that value is to be put on an equality with like goods belonging to a stranger. If the basis of contribution is its value at the place of destination, no freight is to be deducted; or if, for convenience, a deduction is made of the freight at the rate that would be charged to a stranger, that same amount of freight must be brought in again to contribute on its own account. When the invoice cost is taken as the basis, an addition to this must be made of such current freight; that is to say, of the rate current at the time of shipment, and which would have been charged to a third party. This is, of course, subject to the exception pointed out in the preceding paragraph.

Chartered
freight.

Up to this point, the subject of contributory values is perfectly simple, being merely the development of a single principle, itself self-evident, as being involved in the rule of equity which constitutes general average. Complications are introduced, when we have to deal with the contribution of freight under a charter.

The chartering of ships may, for convenience of discussing the present subject, be reduced under three classes. First, a ship may be chartered to fetch or take a cargo, or portion of a cargo, belonging to the charterer. Secondly, the charterer may be a mere speculator, who hires a ship, for a specified sum or rate, to make a particular voyage, intending himself to put her up as a general ship, and load her with the goods of third persons; hoping to make a profit by the difference between the rate of freight he pays to the shipowner and the rate he receives from the merchant. Thirdly, the ship may be chartered, either for a period of time, or for a succession of voyages, by a middle-man, who, whether in law he is or is not regarded as the temporary

owner of the ship, does propose really to work her for his own profit as the owner, the actual owner farming the ship out to him for the purpose. In this last case, whether the charterer appoints the master and crew, or accepts those appointed by the shipowner, is for our present purpose immaterial.

We will discuss these three cases in order, beginning with that which is the simplest, as departing least from the ordinary method of affreightment by bill of lading.

In the first of these three cases, when a ship is chartered to fetch or carry a cargo belonging to the charterer, the freight under the charter must contribute to the general average, whether the cargo is on board the ship at the time of the general average act, or not; since the loss of the chartered ship, whether laden or not, would deprive the shipowner of his expected freight.

Of charters to
fetch cargo
belonging to
the charterer.

This appears from the decision in *Williams v. The London Assurance Company* (1). A ship was chartered by the East India Company, to load a cargo in London for a port or ports in the East Indies, and there take in and carry other cargoes as directed by the Company's agents, and finally return from her last port in India with a cargo for London. For this service, freight at specified rates was to be paid, provided the ship returned to London in safety, but not otherwise. A sum of 3,000*l.*, in anticipation of freight, was payable on sailing outwards. Under this charter she sailed from London; but, having by stress of weather been driven on a sandbank near the Nore, she was obliged to unload her cargo and return to London to repair; which having been done, she proceeded on her voyage. This accident gave rise to a claim for general average; and for this, a dispute having arisen as to the amount of liability, an action was brought

by the shipowner against one of his underwriters. At the time of commencing the action, the ship was still absent on her voyage. The point in dispute was, whether the freight to be earned under this charter-party, the amount of which was estimated at 5,740*l.*, should be brought in as an interest contributing to the general average.

It is mentioned in the report of the case that, between the time of bringing the action and the trial, the ship had arrived in the Thames with her homeward cargo on board, but had not reached her moorings, nor was yet in a situation to deliver her cargo. In the argument, some stress was laid on this circumstance; and it was agreed by counsel that the freight should be taken as actually earned.

The Court of King's Bench unanimously determined that the freight under the charter must contribute. "It is contended," said Lord Ellenborough, "that the whole freight out and home is not liable: but the whole was affected, and might have been frustrated by the loss, and was eventually preserved to the owners by the repairs done to the ship." . . . "The difficulty as to the outward and homeward voyage seems to be removed by the consideration that the whole freight was saved by the repairs." Le Blanc, J., said:—"The stress of the argument for the plaintiffs is this, that the contribution was uncertain at the time of the loss. But, in all cases of contribution to general average, freight cannot at the moment of the loss be received, and therefore the contribution must be always uncertain; and yet in *Da Costa v. Newnham*, freight was determined to be contributory. It is therefore not a decisive argument against its being contributory, that the thing does not exist in certainty at the time of the loss." And Bayley, J., said:—"Here

the plaintiff had a vested right of freight; he had some freight then actually due, and the whole was put in hazard, and the whole has been ultimately earned. . . . This freight was one entire and indivisible sum, payable for the use of the ship out and home; therefore, when ultimately earned, having been put in hazard, and saved, it ought to contribute" (*m*).

[The decision in *Williams v. London Assurance Co.* has been criticised by some writers (*n*), but the liability of the homeward chartered freight to contribute to a general average loss on the outward voyage was not disputed in *Moran v. Jones* (*o*), and was affirmed in the case of *S.S. Carisbrook Co. v. London and Provincial Marine Insurance Co.* (*p*). The facts in this case were that a vessel was chartered to proceed to Savannah, and there, having discharged her cargo (if any), to load a cargo of cotton and proceed therewith to Liverpool, Manchester or Bremen. She sailed in ballast from Fleetwood to Savannah, and in the course of the voyage a general average sacrifice was made. She subsequently arrived at Savannah, loaded her cargo, and earned her freight by completing the voyage. The shipowners having sued the underwriters on the ship for a particular average loss, the underwriters contended that the shipowners were liable to contribute as in general average (*q*)

(*m*) *Williams v. London Assurance Co.* (1813), 1 M. & S. 318.

(*n*) See Benecke, p. 315; Arnould, 2nd edit. vol. 2, pp. 955, 956; Phillips, vol. 2, § 1387. See also per Willes, J., in *Potter v. Rankin* (1868), L. R. 3 C. P. 562, 567.

(*o*) (1857), 7 E. & B. 523.

(*p*) [1901] 2 K. B. 861; [1902] 2 K. B. 681 (C. A.).

(*q*) Where the interests at risk are owned by the same person, so that there is no contribution, losses in the nature of general average must nevertheless be adjusted between him and his insurers as if the interests were owned by different parties. (*Montgomery v. Indemnity Mutual Marine Ins. Co.*, [1902] 1 K. B. 731 (C. A.); Marine Insurance Act, 1906, s. 66, sub-s. 7.)

in respect of the chartered freight, and both Mathew, J., and the Court of Appeal held on the authority of *Williams v. London Assurance Co.* that their contention was well founded. In the course of his judgment, Collins, M.R., said :—

“Looking at the matter in point of principle, and apart from authority, it would seem to me that the freight should be one of the contributories in such a case as this. The vessel in a round charter such as this is earning the only freight that is payable from the moment it breaks ground down to the time it delivers the cargo at the ultimate port. . . . No doubt there are differences of convenience when there is a cargo carried to the intermediate port as distinguished from the case where no cargo is carried to the intermediate port, and if cargo is carried under a charter which entitles the ship to a freight at the intermediate port, one can easily understand why the average adjusters should make a difference and limit the contribution in respect of such an average sacrifice, on what I may call the first part of the voyage, to the freight which was to be earned at the first port where the cargo was to be discharged. No doubt the principle laid down in *Williams v. London Assurance Co.* is open to some criticism, but it seems to me, on the whole, to be a sound working practical rule, and, speaking for myself, I am not able to find any better one. It seems to me the difficulties suggested by those writers who have questioned the rule adopted in *Williams v. London Assurance Co.* are greater than the difficulties of the rule itself. But I think, also, that it has been shown that the objections are really not so formidable as they might at first appear. They are objections pointing to the difficulty of estimating the proper value to be put upon the freight at risk, rather than difficulties arising from taking it into consideration at all. In such a case as this, where there is no cargo taken out and the ship goes out in ballast to some intermediate place and there loads a cargo, I do not understand it is questioned that in some form or other the freight to be earned upon the round voyage ought to be taken into consideration, although it is suggested it ought to be apportioned, and somehow or other an estimate arrived at of what freight would be taken to be earned, if earned at all, at the intermediate place. I think, notwithstanding, whatever may be the true view, and whether these writers are right or wrong in their views as to what ought to be the law, the law laid down in *Williams v. London Assurance Co.* is the law of this country.”]

There are some passages in the judgment in *Williams v. London Assurance Co.* from which it might be inferred that the circumstance that the chartered freight was in fact eventually earned formed a material point; that, in fact, the freight would not have been made to contribute had the ship been lost on the way home. No great weight, however, can be attached to these dicta. The question raised by them forms part of the wider question, what period of time, and what state of facts, are to be taken as the basis of contribution? a question which was not discussed at the trial.

It seems reasonable to hold that, wherever there is a freight that can be insured, there is a freight that should contribute to general average. For, the principle which regulates the right to insure future freight is this: there must, at the time at which the policy is made to attach, be a legal certainty,—that is to say, a certainty contingent only on perils which may be insured against,—of earning freight: and, wherever there is such a certainty, there is an interest which is exposed to hazard by sea peril, and has been rescued from loss by the general average act (*r*).

(*r*) The term “legal certainty” is only used by Mr. Lowndes, and the authorities do not establish the positive rule that there is an insurable interest when there is the certainty of which he speaks. The rule is usually stated negatively, *i.e.*, that there cannot be an insurable interest unless it is certain that but for the perils insured against the freight would have been earned, and is so stated with reference to the perils of the voyage on which the freight is to be earned. (See per Lord Ellenborough, in *Forbes v. Aspinall* (1811), 13 East, at p. 325; per Lord Tenterden, in

Flint v. Fleming (1830), 1 B. & Ad. at p. 48; 1 Arnould, 2nd edit. pp. 288, 289.) When the rule is so stated, the condition that there must have been an inception of performance of the contract (see *infra*, § 72) may be regarded as a deduction from the rule. For a full discussion of the question when the insurable interest in freight commences, see 1 Arnould, 8th edit. §§ 272-279.

The editors fail to see why the existence of an insurable interest should be the test of liability to contribute in general average. Mr. Lowndes' view is opposed to the

When does
the interest in
freight com-
mence?

§ 72. The time at which the insurable interest in freight commences has been defined by several decisions in the courts. The principles to be extracted from these decisions may for our present purpose be reduced under two heads. First, it is immaterial how complicated may be the voyage or voyages stipulated for under the charter, or how many parts it may consist, or how many distinct cargoes may have to be carried, provided the charter from first to last be one and entire. Secondly, it is not enough that the charter has been executed: there must likewise have been an inception of performance under it(*s*). The reasonableness of this last condition is not perfectly clear(*t*); for it does not seem to be involved in the principle which merely requires a legal certainty of earning freight as the condition of insurable interest; which certainty in fact exists so soon as the charter is signed(*u*). If, for example, after a charter has been legally executed, but before the ship has been moved out of the dock where she lies, or any step has been taken towards placing her

opinions of Willes and Blackburn, JJ., on this point in *Rankin v. Potter*, cited *infra*, note (*x*). See also *post*, p. 365, note (*u*).

(*s*) On the authorities it seems to the editors more correct to say that there is an insurable interest either when there has been an inception of the voyage described in the charter-party, or when the shipowner has taken some step for the purpose of performing his contract. (See 1 Arnould, 8th edit. §§ 272-279; and see also the cases quoted in note (*x*), *infra*.)

(*t*) An argument in favour of the reasonableness of this condition is that it restricts the violation of the fundamental principle of indemnity due to the rule that the assured is entitled to recover the gross freight.

If, as Mr. Lowndes thinks ought to be the rule, the assured had an insurable interest in his freight as soon as he had made a contract, a shipowner who made say three separate charter-party contracts for successive voyages could at once effect insurances on all three, and if the ship were lost immediately afterwards recover the gross amounts of all the freights. It is true that at present the principle of indemnity is violated to a considerable extent, if a loss takes place before much expense has been incurred on the voyage, the freight of which has been insured; but that circumstance is hardly a reason for not drawing a line to prevent greater violations of the principle.

(*u*) See, however, note (*r*), *supra*.

in the service of the charterer, the ship is destroyed by fire, the shipowner's loss of the chartered freight is the same loss, depriving him of an expected gain which at that period was as certain, as if the ship had been lost while going out in ballast, or with the goods on board. Still, the cases, though not very clearly, indicate this limitation (*x*).

(*x*) *Williamson v. Innes* (1831), 1 Moo. & R. 88; 8 Bing. 81, n.; *Forbes v. Aspinall* (1811), 13 East, 323; *De Vaur v. Janson* (1839), 5 Bing. N. C. 519. In *Barber v. Fleming*, Blackburn, J., said:—"When a shipowner has got a contract with another person for freight, and has taken steps and incurred expense upon the voyage towards earning it, then his interest ceases to be a contingent thing, but becomes an inchoate interest, and is an interest which, if afterwards destroyed by one of the perils insured against, is lost, and ought to be paid for by the underwriters." ((1869), L. R. 5 Q. B. 71.) The most recent decision upon the subject (*Foley v. United Fire and Life Insurance Co.* (1870), L. R. 5 C. P. 155 (Exch. Ch.)), reduces the limitation in question within very narrow bounds, if it does not really do away with it altogether. A ship, which had been chartered in Calcutta to carry a cargo to Mauritius, and had loaded her cargo, was again chartered to proceed on her present voyage to Mauritius, and, having discharged her cargo there, to proceed to Akyab, and there load a cargo of rice for the United Kingdom. The freight under this second charter was insured at and from Mauritius to Akyab, &c. After the ship had reached Mauritius, and while she was still unloading her cargo, a gale came on, in which she was wrecked. The ques-

tion came to trial, whether, at the time of loss, there was an inception of insurable interest under the homeward charter. For the underwriter, it was strongly urged that this was not so, since up to that period there had been no inception of performance under the second charter-party; the vessel being still engaged in carrying out the charter-party entered into previously. This argument, however, was overruled by the court. Kelly, C. B., said:—"The real doctrine is this: if the voyage, by means of which the chartered freight is to be earned, has commenced, there is an inchoate interest in the freight, and the risk attaches; provided the language of the charter, taken with the policy, will warrant that view of the case. . . . That brings us to consider what are the terms of this charter-party. Now, it is the express contract in the charter-party that the voyage shall commence at Calcutta; and the inchoate right to the chartered freight commenced when the voyage from Calcutta commenced." In *Potter v. Rankin* ((1868-1870), L. R. 3 C. P. 562; 5 C. P. 341), where a ship, while on her voyage from Liverpool to New Zealand, was chartered to go thence to Calcutta, and there load a homeward cargo, no question was raised either in the Common Pleas or Exchequer Chamber, as to the legality of an insurance of the homeward freight for the out-

This, then, may be laid down as a rule of practice for chartered ships: whenever a ship is chartered under an entire contract, the freight to fall due under the charter must contribute towards a general average which occurs at any period subsequent to the inception of the chartered voyage, whether the cargo, in respect of which that freight is to be earned, be on board the ship at the time or not.

This is so, if the ship is at the time in ballast, or is laden with goods belonging to the charterer. It has been doubted, however, whether the same rule should apply when there are on board goods belonging to third parties, who are strangers to the charter. Such goods may be shipped under contracts made either with the shipowner or the charterer. It frequently happens that, when a ship has been chartered to go to a distant port to fetch home a cargo belonging to the charterer, it is stipulated in the charter that, instead of the ship's going out empty, the shipowner may take out goods on freight for his own benefit: sometimes such a liberty is given to the charterer. If, under such a stipulation, she is put up as a general ship, and filled with goods for the outward passage, shipped under bills of lading, it has been contended that the freight under the charter-party ought not to contribute to a general average which may occur on the outward passage. The reason given is, that the outward cargo has no common interest with the homeward freight (*y*). It is not easy to understand this argument.

ward passage to New Zealand; and the right to recover was distinctly recognized by the House of Lords. (*Rankin v. Potter* (1873), L. R. 6 H. L. 83.) In this case it is to be remarked that Willes, J., expressed an opinion (L. R. 3 C. P. at p. 567) that the policy in question would not be liable

for general average incurred on the voyage out; and that this passage in his judgment is quoted with approval by Blackburn, J., in giving his opinion to the House of Lords. (L. R. 6 H. L. at p. 115.)

(*y*) Baily, Gen. Av. p. 152.

Every kind of property, and every expectation of gain which is sufficiently tangible and certain to be treated in law as on the same footing as property, must, if exposed to a common hazard, and rescued from loss by the same act, be said to have, to this extent, "a common interest" (z) one with another. The fact that the cargo on board belongs, not to the charterer, but to some third party, does not render the chartered freight less valuable, or the earning of it less certain.

It may be argued that, since in such a case the contribution must be levied on the values as existing at the termination of the common adventure, that is, when the cargo quits the ship, the homeward freight, which at that point of time has no existence, ought not to be brought in as a contributor. The answer is: The contribution is really between the owner of the ship and the owners of the cargo: and we have to consider the values, at the given point of time, of the property belonging to each; and the ship, at that point, is, or may be, really more valuable to her owner by reason of the existence of the homeward charter. The dividing of the shipowner's contribution under the two heads of ship and freight is, for the cargo, immaterial; it is done simply for the convenience of a settlement with insurers (a).

(z) That "common danger" is the foundation of Bailly's "common interest," appears from his own definition of the principle. (Bailly, Gen. Av. p. 2.)

(a) So far as the practice of English average adjusters is concerned, this controversy has been ended by No. 34 of the Rules of Practice of the Association of Average Adjusters, adopted in 1902. The rule provides that when at the time of a general average act the vessel has on board cargo shipped

under charter-party or bills of lading, ulterior chartered freight shall not contribute to the general average; and this rule, though inconsistent with the adjustment in *Moran v. Jones* (1857), 7 E. & B. 523, may be supported on the practical ground that the ulterior freight cannot, at the time when the cargo quits the ship, be properly estimated for the purpose of contribution. There is even the possibility that through delay, quarantine, or other unfore-

Of speculative
charters.

§ 73. We are in the second place to consider the case of those speculative charters, in which the charterer does not propose to load the ship with goods of his own, but merely stands as a middleman between shipowner and owners of cargo, paying the former at a fixed rate, and making his own contracts with the latter, looking for his profit to the difference between the two rates.

In practice, such speculative contracts are disregarded for the purposes of contribution, being put on the same level with speculative sales of the cargo when afloat. That is to say, if the general average takes place after the cargo has been shipped or contracted for, it is the freight under the bills of lading, and that only, which is made to contribute (*b*).

seen events the expenses of earning the freight which ought to be deducted will equal the gross freight.

The editors also submit, notwithstanding Mr. Lowndes' arguments, that the rule of practice is founded on a correct principle. So far as the cargo is concerned, the common adventure comes to an end, and the adjustment ought in general to be made, at its final port of discharge. The ulterior freight is not earned on that adventure, but on an adventure with which the cargo is not concerned. This fact seems to the editors a sufficient reason for not making the ulterior freight liable to contribute to a general average loss in the course of the earlier adventure. (See the opinions of Willes and Blackburn, JJ., in *Rankin v. Potter*, cited *supra*, p. 364, n. (*x*), and Carver, § 439, where it is pointed out that if the homeward freight were treated as a contributory to the outward cargo, the outward cargo should be a contributory to a loss of that freight caused by a sacri-

fice of the ship on the outward voyage.

Mr. Lowndes' argument that it is immaterial whether or not the shipowner's contribution is divided between ship and freight is not consistent with his own statement in the following pages of the work; for if the division be made, the ulterior freight will have to be assessed at its gross amount, less the estimated expenses of earning it. (See *post*, p. 372.) The net amount will then be added to the value of the ship apart from her engagements, to ascertain the shipowner's contribution. On the other hand, if the division be not made, the value of the ship will not necessarily be increased by the amount of the freight. If the chartered rate does not exceed the current rates of freight, the value of the ship will probably be the same (see *infra*, p. 368) as if the charter-party had not been made.

(*b*) Should the rate under the bills of lading be higher than the char-

The propriety, and indeed necessity, of this rule will appear, if we consider the position of the parties in the case of jettison of cargo. All that can be allowed on the whole for the jettison evidently is, the actual value of the goods without deduction of freight. This amount has in some way to be divided between the owner of the goods, the shipowner, and perhaps the charterer. The owner of the goods is entitled to receive their value, deducting the bill of lading rate of freight. If, then, this rate is lower than the chartered rate, the shipowner must lose the difference. But it would be an anomaly to make this difference contribute to general average, when, although liable to be lost by reason of a jettison, such loss would not be compensated by contribution (*c*).

This exclusion from general average of the speculative portion of the chartered freight—that is to say, the excess of the chartered rate over the bill of lading rate—only comes into operation after the goods have been shipped or contracted for, because it is not till then that its unsubstantial character is determined. If, therefore, a general average takes place while the ship is proceeding in ballast, under such a charter, towards the loading port, the freight under the charter must contribute (*d*).

The third class of cases to be noticed consists of those in which the charterer becomes in some sense the temporary owner of the ship. If, for example, a steamer is chartered for twelve months, to be at the absolute disposal of the charterer, and the charterer employs her

Of charters which make the charterer the temporary owner of the ship.

tered rate, the freight's contribution must of course be divided between the shipowner and the charterer in the proportions of the benefit derivable from the carriage by each. This, however, does not affect the principle

as stated in the text.

(*c*) But see against this, *ante*, p. 107 *et seq.*

(*d*) See *S.S. Carisbrook Castle v. London and Provincial Mar. Ins. Co.*, *ante*, p. 359.

to make a series of short coasting trips, carrying perhaps twenty different cargoes in the time, is the ship's hire under the charter to contribute to a general average that may occur on any one of these voyages?

This is a case in which it is difficult to separate the freight from the value of the ship. The value of this steamer to her owner is made up of two ingredients—the freight he is to receive for the twelve months during which she has been hired, and the value now of a vessel which is not to come into his possession, for any purpose of profit, until the end of twelve months. Whether these two elements of value are added together, and taken as the value of the ship, or whether they are divided under the heads of ship and freight, is a matter of indifference to the cargo. If a division is made, it can only be done for convenience of settlement with insurers on ship and freight; and as, in the case put, the freight under the charter is certainly insurable, it may be more convenient so to divide it.

General principle.

On pure principle, in all these cases of chartered freights, the basis of contribution ought first to be determined by taking the value of the ship and freight together, and considering to what extent, if at all, the value of the ship is enhanced by having her engagements settled beforehand. That enhancement never can reach to the full amount of the chartered freight. Strictly speaking, it reaches only to the excess of the chartered rate over the rates of freight current at the places where the ship may be; since the latter could be obtained were the ship not chartered.

In dividing this total between ship and freight, the true principle would seem to be, that the value of the ship, merely as ship, is, her value apart from contracts: in other words, the sum she would fetch in a proper

market, if free to be sold without her engagements: and the difference should be taken as the contributory value of the freight (*e*).

§ 74. When it is stipulated in the charter-party that a portion of the freight, instead of depending on the completion of the voyage, shall be absolutely prepaid, ought that circumstance to shift the burden of contribution to general average, in respect of that portion, from the shipowner to the charterer?

Advances
under charter-
party.

At first sight, this seems to be the height of injustice. The charterer, for the benefit of the shipowner, agrees to pay freight beforehand, and to pay absolutely, even in the event of a loss which may deprive him of all advantage from the use of the ship: is his doing so to throw upon him an additional burden, which he did not bargain for? There are not many countries, except our own, in which this question has been answered in the affirmative. Elsewhere it is generally the rule that the contribution to general average in respect of freight is in all cases borne by the shipowner, at whatever period of the voyage the freight is payable. It is not so in this country.

The argument in defence of the English rule is, shortly, this: general average is a species of ransom from total loss, and the liability for it is to be determined by inquiring, not what party contracted beforehand, or supposed he was contracting, to pay it, but simply, who would have been the loser, and to what amount, had the ship been totally wrecked instead of being saved. There is no reason why a shipowner and a charterer should not make a bargain together that the freight, or a portion of it, shall be absolutely prepaid. In making such a bargain, the charterer knows or ought to know that, as a

(*e*) Cf. *ante*, p. 365, note (*a*).

necessary consequence, the ship's safety becomes a matter of greater importance to him, and of less importance to the shipowner, precisely to the extent of the prepaid freight: and that, being thus more deeply interested in her safety, he must become a larger contributor to the cost of saving her. Hence the English rule, paradoxical as it certainly appears at first sight, is really more consistent with the true principles of general average than that which prevails in other countries.

That the charterer, and not the shipowner, is the party liable under English law to contribute to general average in respect of prepaid freight, is expressly determined by *Frayes v. Worms*; in which case Mellish, as counsel for the charterer, brought forward the argument then mainly relied on in the United States (*f*), viz.: that the charterer, in making the advance, did not contract to incur an additional liability in respect of general average; but this argument was rejected by all the judges, who agreed in holding that the only question was, who was the party that actually derived benefit from the saving of the ship (*g*).

This rule is invariably acted on in the practice of adjusting averages.

In what cases
is prepayment
absolute.

We have to consider, then, what stipulations in a charter-party have the effect of constituting an absolute prepayment of freight, not to be refunded in the event of loss during the voyage. It is necessary that this intention should in some way appear upon the face of the charter [or if there is no stipulation for an advance in the charter, that the intention should be clearly shown

(*f*) See Phillips, Ins. § 1404. As to the American law on this subject, see *Meldonado v. British & Foreign Mar. Ins. Co.*, Appendix V., *post*, p. 772.

(*g*) *Frayes v. Worms* (1865), 19 C. B. (N. S.) 159. See, also, to the same effect, though less express, *Hall v. Janson* (1855), 4 E. & B. 500.

by the transaction between the parties (*h*); otherwise] a payment on account of freight will be regarded as subject to the same condition as the freight itself, of not being earned unless the service undertaken is performed (*i*). But this intention to make the prepayment absolute is most commonly shown upon the charter, not expressly, but in the way of inference: and this is sufficient for the purpose (*k*). If, for example, the charter is worded thus: "freight to be paid as follows: cash for the ship's port charges and disbursements abroad to be advanced by the charterer, and the remainder of the freight to be paid on delivery of the cargo" (*l*): or, "cash to be advanced, such advance to be in part payment of the freight" (*m*): the courts will infer from these phrases an intention that the prepayment shall be absolute. A form more generally in use at the present day is: "cash to be advanced, subject to insurance," or, "the shipowner to pay for the insurance." The employment of this phrase has the same effect. The use of the term "insurance" in connection with the advance is held to imply that the advance is of such a nature as to give an insurable interest; which it would not be, were not the charterer to run the risk of the voyage. The circumstance that the shipowner agrees to pay the cost of the insurance does not affect this inference; such a stipulation being regarded by the courts as meaning no more than that the shipowner allows to the charterer the cost of the insur-

(*h*) See *The Karnak* (1869), L. R. 2 P. C. 505, 514.

(*i*) *Manfield v. Maitland* (1821), 4 B. & Ald. 582.

(*k*) See the opinion of Brett, J., in *Allison v. Bristol Marine Ins. Co.* (1876), 1 App. Cas. 209, 215, in which

all the previous authorities are reviewed.

(*l*) *De Silvale v. Kendall* (1815), 4 M. & S. 37.

(*m*) *The John* (1849), 3 W. Rob. 170.

ance, by way of bonus or compensation for his making the advance (*n*).

Cockburn, C. J., in one case, expressed his regret that the law in this respect should be such as it is, considering it to be founded on an erroneous principle. It would have been better, in his lordship's judgment, to have allowed no exception to the rule which makes the earning of freight conditional on the completion of the voyage undertaken. At the same time, he acknowledges that the rule is too firmly established by a series of precedents in this country to be now disturbed (*o*).

Deductions
from freight.

§ 75. The only question now remaining to be considered is, what deductions should be made, from the contributory value of the freight, for the expenses of earning it. To this the answer is clear on principle: those expenses must be deducted, which are incurred for the purpose of earning the freight, and which would not have been incurred had the ship, instead of being rescued from total loss by the general average, been at that point of time totally lost.

Crew's wages.

The wages of the crew, wholly or in part, come under this rule. By the common law of England, which in this respect corresponded to the general maritime law still prevailing in most other countries, the crew, in case of total loss of the ship, were not entitled to their wages for the uncompleted portion of the voyage: that is to say, their wages were only due up to the

(*n*) *Hicks v. Shield* (1857), 7 E. & B. 633; *Frayes v. Worms* (1865), 19 C. B. (N. S.) 159; *Jackson v. Isaacson* (1858), 3 H. & N. 405; *The Karnak* (1869), L. R. 2 P. C. 505; *The Red Sea*, [1896] P. 20 (C. A.).

(*o*) *Byrne v. Schiller* (1871), L. R. 6 Ex. 319; in Exch. Ch. As to the law of the United States on this subject, see *Parsons, Ins.* p. 186 (3rd edit.).

last point at which freight had been earned (*p*). On this state of the law, a total loss of the ship, while inflicting on the shipowner a loss of the freight to be earned, relieved him of the crew's wages for the whole voyage,—that is to say, either from the time when the crew were shipped, or from the time when freight was last earned, if the latter period was subsequent to the former. This amount of wages, therefore, on that state of the law, properly formed a deduction from the contributory value of the freight.

This rule is modified, so far as British-owned ships are concerned, by the provisions of the Merchant Shipping Act.

[The Act of 1894 (*q*) contains, in Part II., the following clauses (*r*) bearing on the subject:—

§ 157.—(1) “The right to wages shall not depend on the earning of freight; and every seaman and apprentice who would be entitled to demand and recover any wages, if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to claim and recover the same, notwithstanding that freight has not been earned. . . .”

§ 158. “Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, . . . he shall be entitled to wages up to the time of such termination, but not for any longer period.”

(*p*) Abbott on Shipping, 5th edit. p. 457.

(*q*) 57 & 58 Vict. c. 60.

(*r*) By sect. 260, these clauses apply to all sea-going ships registered in the United Kingdom; and by sect. 261 (d) they apply to all sea-going British ships registered out of the United Kingdom, except where the ship is within the jurisdiction of the British

possession in which she is registered. By sect. 261 they apply to unregistered British ships which ought to have been registered under the Act. The provisions of Part II. are applied by sect. 263 (2) to Scottish fishing-boats, and as regards other fishing-boats of the United Kingdom sect. 383 (1) provides that wages shall accrue from day to day.

Sections 157 (2) and 174 make provisions for the payment of the wages in the case of seamen or apprentices who die before the wages are paid or are lost with the ship to which they belong.]

It follows that, with regard to vessels which come within the provisions of the Act, it is not right to deduct from the contributory value of the freight the crew's wages for the entire voyage, but only so much of the wages as would be saved to the owner by a total loss; that is to say, the wages from the date of the general average act to the termination of the voyage: and this is now the practice in this country. The same rule must apply to ships of such other countries as adopt the modern English law with regard to the payment of the crew.

Provisions.

The provisions of the crew are not deducted. The reason given for this in some of the books is, that the provisions are included in the insurance of the ship. A better reason is, that the provisions are laid in beforehand, so that the loss of the freight does not relieve the shipowner from the expense of provisioning her (s).

Coal for a steamer.

For the same reason the cost of coals bought previously to the general average act is not to be deducted from the contributory freight of a steamer.

Port charges.

Port charges and canal dues incurred subsequently to the general average act, but not those incurred previously, are, properly and in practice, deducted from the freight. Under the head of port charges is included the cost of discharging the cargo.

(s) On principle, provisions and coals laid in after the general average act, and consumed before the end of the voyage, ought to be treated as

part of the expenses of earning the freight. There is, however, no settled practice on this point.

§ 76. The ship, the cargo, and the freight, constitute, generally speaking, the whole of the property on ship-board liable to contribute to general average (*t*). Should there be any kind of property, not coming under any of these heads, which is preserved from destruction by a general average act, this likewise must contribute, unless there be some special reason for exempting it (*u*). The lives which are preserved are not brought into account; by reason, it has been said, of the impossibility of assessing them at a pecuniary value (*x*). The mariners are not required to contribute in respect of their wages; the reason given being, that they are supposed to have done their share towards the ship's preservation by their personal efforts (*y*). The luggage and personal effects of passengers and crew do not contribute; the former, apparently, for no other reason than the comparative insignificance of their value (*z*). These are the only exemptions (*a*). Everything which is covered by an ordinary policy of insurance on the ship, that is to say, her appurtenances of every kind, including the provisions laid in for the voyage and unconsumed at the end of it, is brought into contribution as included in the value of the ship. If there be anything else on shipboard, not

Other kinds of contributing interests.

(*t*) Concerning passage-money, see *post*, p. 382.

(*u*) Government stores in a transport are liable to general average. (See 2 Arn. 8th edit. § 973.) So determined in the U. S. (*United States v. Wilder* (1838), 3 Sumner, U. S. 308.) But, as against a Government, such a right can only be enforced by means of the ship-owner's possessory lien. (See *Favasseur v. Krupp* (1878), 9 Ch. D. 351; *The Parlement Belge* (1880), 5 P. D. 197, 215 (C. A.); *Young v. S.S. Scotia*, [1903] A. C. 501.)

(*x*) Park, Ins. 8th edit. p. 293.

(*y*) *Ib.*

(*z*) 2 Arn. 8th edit. p. 936. But Arnould said that the reason why passengers' baggage had been exempted was, that it was not put on board as merchandise (see *infra*, p. 377), although on principle he thought that, if of sufficient value, it ought to be brought in to the contributory interest.

(*a*) Magens says, "What pays no freight, pays no average;" but this is plainly unreasonable, and is now disregarded in practice.

constituting merchandise in the proper sense of the word, yet possessing a substantial value, it ought to contribute. For example, the unconsumed stores of a troop ship, or those laid in by a passenger charterer (*b*); planks or other materials used as dunnage, or covering-boards, or for the construction of temporary bulkheads for cargo, or the like, should properly be brought in as contributing. It is only the small value of such articles which occasions their being, in practice, frequently disregarded.

[The rule laid down by Mr. Lowndes, that any kind of property saved by a general average act must contribute in the absence of special reasons for exemption, is based on the fundamental principle of general average (*c*); but it conflicts with the grounds of the decision in *Brown v. Stuppleton* (*d*). The question in that case was whether provisions, and victualling stores, shipped by the defendants on a vessel which they had chartered for the conveyance of convicts to Australia, intended for the use of the convicts, but unconsumed at the time of the general average act, were liable to contribute. The Court of Common Pleas held that the claim could not be supported. "It is not," said Best, C. J., "every object of value which has been held liable to a contribution for average, but only such stores as are termed *merces*. *Merces* has never been held to extend to

(*b*) Arn. 4th edit. p. 793. See also Arnould, 6th edit. p. 890; but cf. *Brown v. Stuppleton* (1827), 4 Bing. 119; 12 J. B. Moore, 334, *infra*.

(*c*) Magens (vol. 1, p. 62) and Stevens (p. 44) maintain that "what pays no freight pays no average"; but the latter author inconsistently allows (p. 45) that this rule should not be construed literally; for it

would be very unjust that the master, or owner, or any other person who had goods on board, should not contribute, merely because he pays no freight for the carriage of them." By goods he means "the wares or cargo for sale, laden on board the ship."

(*d*) (1827), 4 Bing. 119; 12 J. B. Moore, 334.

provisions, but includes only the cargo put on board for the purposes of commerce; and the practice shows that this has been the understanding of all times. Magens, Molloy, Stevens, and other writers, all expound the word 'merces' in this way; all in terms exclude provisions. They concur in saying that things of light weight, but of considerable value, must contribute, if they belong to the cargo, but not if they belong to the passengers. Provisions are laid in for the passengers, and must be esteemed to belong to them." Bingham's report of the judgment of Park, J., leaves it doubtful whether the learned judge agreed unreservedly with the rule laid down by the Chief Justice; but Moore's report makes it clear that he assented to the proposition that only goods which are shipped as merchandise are liable to contribute. "Provisions," he said, "have always been held to be excepted from the rule of contribution, which only applies to merchandise put on board for the purpose of traffic. In the term *merchandise* is included jewels and articles of like nature, not being the wearing apparel or ornaments of the passengers, but the subject of traffic" (*e*).

If the doctrine that only goods put on board as merchandise are liable to contribute is accepted as the rule of English law, it follows that all the effects of a passenger are exempt (*f*); and the general practice in this country seems to have been to exempt them (*g*).

(*e*) 12 J. B. Moore, p. 338. Phillips (vol. 2, § 1399) says that the assumption in this case that only goods which are *merces* contribute, is erroneous, or at least very questionable.

(*f*) See Abbott, 5th edit. p. 356; Stevens, p. 44. Benecke, however, maintains (p. 308) that passengers ought to contribute for their trunks and luggage, and Beawes (p. 243,

6th edit.) limits the exemption to apparel in use.

(*g*) In a recent case, however, where much damage had been done in quenching a fire on board a passenger steamer, the general average was settled in the following manner: the passengers' luggage was made to contribute and the damage to luggage was allowed in general average; but

Passengers' luggage.

On principle there does not seem to be justification for the exemption of passengers' effects, and even the practical argument that their value is comparatively insignificant has lost much of its force in these days of large passenger steamers, when the aggregate value of the baggage is often considerable, and even the property of a single passenger may be worth a large sum. It is, however, apprehended that if passengers' effects were to be held liable to contribution, the liability would be restricted to such effects as are stowed in the baggage compartment, thus exempting the property which the passenger retains in his own care for use on the voyage, and which, in this sense, is attached to his person (*h*). Yet there are practical objections even to this limited responsibility. It must often be difficult, if not impossible, at the time of disembarkation to obtain a proper valuation of the effects of each passenger, to fix the amount of his contribution, and to enforce payment or exact security for the claim; and after the passengers have left the ship and dispersed, a right of action only enforceable by a number of separate law-suits, most of them for trifling amounts, would be an illusory remedy. Thus the right to contribution from passengers would in most cases probably resolve itself into a claim for damages against the shipowner, for failing to enforce

the luggage which was uninsured and was not entitled to any contribution was valued at the lump sum of 10,000*l.*, and its contribution was paid by the shipowners. Thus no passenger was in fact called upon to pay a contribution.

(*h*) In *The Willem III.* (1871), L. R. 3 A. & E. 487, Sir Robert Phillimore held that the wearing apparel of passengers and other effects carried by them for their daily

personal use were not liable to pay salvage; and it was admitted that wares or merchandise belonging to them were liable to contribute.

Lord Justice Kennedy considers (*Civil Salvage*, 2nd edit. p. 59) that there is no legal principle for the exemption, from payment of salvage, of such luggage and valuables as are not in daily use and are in the custody of the ship.

the right on behalf of the party whose property has been sacrificed.

The question whether passengers' effects are liable to contribute has never arisen in the English courts, but it was litigated in the United States some twenty-four years ago, the action being brought against the shipowners by a passenger whose luggage had been damaged in extinguishing a fire in the baggage compartment, for damages for their failure to enforce the right of contribution against either the cargo or the other passengers' baggage (*i*). Brown, D. J., in a learned and exhaustive judgment, declared it to be a universal rule that there is contribution for a sacrifice of passengers' effects. Reciprocity, he further says, is the rule in general average; but it is not an indispensable part of the principle, and there may be special reasons why a class of articles that share in the common benefit might not be called on to contribute, even though they were to be contributed for. Nevertheless, he came to the conclusion that the passengers' baggage is liable to contribute, with the exception of the apparel and other articles which they take with them for use on the voyage. Even if the practice not to detain and hold baggage for a general average adjustment were so long settled and acted on as to form an implied condition upon which passengers embark, he maintains that it would not relieve the passenger from the obligation to contribute. The editors may, however, point out that if there be no lien on the baggage for general average, and the party whose property has been sacrificed has only a right of action against the individual passengers, he will certainly fail

(*i*) *Heye v. North German Lloyd* (1887), 33 Fed. R. 60; on appeal (1888), 36 Fed. R. 705.

to obtain a contribution from many of them, and his position will be worse than if they were totally exempt, and contribution were only levied upon the ship and cargo (*k*).

Jewels and
other
valuables.

Jewels, precious stones, and other small articles of great value, if shipped as cargo, must contribute (*l*). When such articles are brought on board by a passenger as part of his effects, the extent to which they are exempted from contribution is variously stated by the textwriters (*m*). If the correct rule be that only goods shipped as merchandise are liable to contribute (*n*), there is no necessity to consider specially the case of jewels and other valuables. If, however, this be not the rule of English law, it seems obvious that valuables which are stowed away as part of a passenger's luggage ought to be treated in the same way as his other effects in the baggage compartment. Jewellery and other valuables which he retains in his own care for use or ornament during the voyage ought, it is submitted, to be exempt on the analogy of wearing apparel in use. It may be urged with some show of reason that other valuables

(*k*) On appeal the only question raised was whether the damaged baggage had to be contributed for, and on this point the judgment of the District Judge was unanimously affirmed. (36 Fed. R. 705.)

(*l*) 1 Park, 8th edit. 293; *Peters v. Milligan* (1787), ib. 296; per Park, J., in *Brown v. Stapyleton*, ante, p. 377.

(*m*) Beawes (p. 243, 6th edit.) says that money and jewels must contribute, and only exempts apparel in use. On the principle that what pays no freight, pays no average, Magens (vol. 1, p. 62) and Stevens

(p. 44) exempt the jewellery as well as the apparel of passengers. Abbott (5th edit. p. 356) says that jewels or other things belonging to the persons of passengers or crew, and taken on board for their private use and not for traffic, do not contribute. Arnould (vol. 2, 2nd edit. p. 936) states that all small articles of value contribute, unless carried about the person, or forming part of the wearing apparel. Marshall (4th edit. p. 432) exempts jewels or ornaments when belonging to the persons of the people on board.

(*n*) See ante, p. 376.

which the passenger keeps in his own care ought to contribute, especially if he carries them for purposes of trade. Yet the practice not to exact contribution in respect of valuables in the passenger's own care, partly due, perhaps, to the difficulty of ascertaining their existence without resort to inquisitorial methods of an extreme kind, may be supported on the ground that they do not run the same risks as merchandise or luggage in the hold. For they can usually be saved with the person, and therefore incur no greater danger than the passengers themselves.

Phillips is of opinion that bank notes ought not to contribute, as they "are not so properly actual property, to the amount promised to be paid, as the evidence of demands, which evidence may be supplied by others in case of their being lost" (*o*). Arnould, on the other hand, following Weskett, considered that they ought to contribute, on the ground that they are convertible into money, and are saved by the sacrifice from becoming valueless (*p*). It is submitted that no instrument or security ought to be made to contribute, the loss of which does not necessarily put an end to the obligation which it creates, and if this be the correct view Arnould's opinion cannot be sustained as regards obligations enforceable in this country. For although at common law, according to the weight of authority, an action could not have been maintained on a bill or note which had been lost or destroyed, relief could have been obtained in equity when there was no remedy at common law (*q*); and now

(*o*) 2 Phillips, § 1397.

(*p*) 2 Arnould, 2nd edit. p. 936;
Weskett, tit. Contrib. No. 1.

(*q*) See *Hansard v. Robinson* (1827),

7 B. & C. 90; *Ramuz v. Crowe* (1847),

1 Exch. 167; *Crowe v. Clay* (1854),

9 Exch. 604; Chitty on Bills, 11th
edit. p. 191.

by statute in an action on a bill of exchange or other negotiable instrument the defendant will be prevented from setting up the loss of the instrument if a satisfactory indemnity be given him against other claims (*r*).

Mails. It is believed that in practice articles carried under a mail contract have never been made to contribute. A sufficient reason for the exemption of ordinary correspondence is that letters cannot have a definite pecuniary value. On principle, indeed, there seems to be no reason why articles of pecuniary value carried by post should not contribute, though in practice it would be difficult to make a proper valuation of the articles (*s*).

Passage money.

Passage money, being usually paid in advance and not liable to be refunded if the ship is lost, is not made to contribute; but in cases where coolies or pilgrims were carried at so much a head payable on arrival, the passage money, said Mr. Lowndes, was in English practice made to contribute (*t*).]

(*r*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 87; Bills of Exchange Act, 1882, ss. 70, 89; *King v. Zimmerman* (1871), L. R. 6 C. P. 466. See also sect. 69 of the latter Act.

(*s*) In one case, the editors have been informed, the postal authorities

in South Africa, fearing that a claim for general average made by the ship-owners might be pressed, exacted deposits from the receivers of registered parcels; but the shipowners did not pursue the claims further.

(*t*) Lowndes, 4th ed., Appendix O., p. 636.

CHAPTER IX.

LIEN FOR GENERAL AVERAGE, AND LEGAL REMEDIES.

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HAVING thus enumerated the several losses or expenses that constitute general average, and pointed out in what manner each kind is to be computed, and over what interests and in what proportions the burden is to be distributed, there remain only two incidental topics, which must occupy the following chapter. The first is, the machinery which exists in this country for enforcing claims for general average.

The subject of legal machinery may conveniently be subdivided as follows:—In the first place is to be considered what remedies are given at common law, and in particular what is the legal efficacy of the shipowner's right of lien, whether as it exists independently of, or as it has been extended by, Acts of Parliament; and, secondly, what are the remedies of the owners of cargo against the shipowner.

SECTION 1.—COMMON LAW RIGHT OF LIEN.

§ 77. Under ordinary circumstances, the proper tribunal for determining a disputed claim for general average is a Court of Common Law. This, which appears to have been formerly doubted, it having been thought that questions of contribution more properly fell within the province of the Courts of Chancery (*a*), was expressly determined in *Birkley v. Presgrave* (*b*), and has ever since been acted on.

Remedies of
shipowner.
Lien for
general
average.

The shipowner has, at common law, a lien on the cargo while in his possession or in that of his servants as a carrier, not only for the freight, but also for the cargo's share of general average (*c*).

This right of lien would entitle the shipowner to insist on payment of the general average by the consignees before delivery of their goods, were he at that

(*a*) *Sheppard v. Wright* (1698), Show. P. C. 18.

(*b*) (1801), 1 East, 220.

(*c*) "It is a possessory lien at common law, by virtue of which he [the master or owner of the ship] is entitled to hold the goods till his lien be satisfied." (Per Lord Kingsdown, in *Cargo ex Galam* (1863), Br. & L. 167, 182.) The same lien which the master has for general average, he has likewise for special or particular charges on cargo incurred during the transit. (*Hingston v. Wendt* (1876), L. R. 1 Q. B. D. 367.) By the Rules of the Supreme Court, it is provided (Order 50, Rule 8) that "Where an action is brought to recover, or a defendant in his defence seeks by way of counter-claim to recover, specific property other than land, and the party from whom such recovery is

sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the court or a judge may, at any time after such last-mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such court or judge, order that the party claiming to recover the property be at liberty to pay into court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such court or judge may direct, and that upon such payment into court being made, the property claimed be given up to the party claiming it."

point of time in a position to state the amount of his claim. This, however, is seldom or never the case, since the amount of contribution depends upon the value of the goods, which usually cannot be ascertained until they have been landed, and their condition examined. Practically, therefore, this right of lien can only be used as a means for enforcing the giving of satisfactory security or other equivalents for a payment before delivery (*d*).

The terms usually required, as the conditions of delivery, are, that the consignees shall either sign an agreement to pay their shares of the general average, according to the adjustment of a person named, or that they shall pay by way of deposit a sum sufficient to cover the amount of their liability when ascertained (*e*). Mode of enforcing it.

Against the abuse of the power thus given to the shipowner, the English common law provides the following safeguards:— Limitations against abuse.

In the first place, the consignee of goods can always obtain a right to the delivery of his goods, and, consequently, a right of action for damages, if they are not delivered, by tendering to the shipowner or captain a sum sufficient to meet his rightful demand. The duty of determining the amount to be tendered is thus practically cast upon the consignee; unless indeed the shipowner or master shall have made his demand for a deposit in such a manner as to imply a resolution on his part to take no smaller sum; which conduct on his part, it seems, may

(*d*) The enforcement of this lien is rendered the more necessary for a shipowner from the circumstance that a mere consignee of cargo, not being the owner, is not liable for general average. (*Seafie v. Tobin* (1832), 3 B. & Ad. 523.) But one who is not the owner of the goods may by contract be liable to pay the contri-

bution, *e.g.*, the shippers under the terms of the bill of lading in *Walford de Baerdemaeker v. Galindez* (1897), 2 Com. Cas. 137.

(*e*) It is now the usual practice to require consignees to sign an average bond in all cases, whether a cash deposit be demanded in addition or not.

amount to the waiver of a tender, and excuse the consignee for not making it (*f*).

Secondly, although the consignee whose goods have been jettisoned or sold abroad has, at common law, no security against the ship corresponding to the shipowner's right of lien, yet if the shipowner exerts his right of lien to enforce from the former a deposit for general average, he is bound to set against the sum he demands, and place to the credit of the consignee, the amount of any claim which the latter may rightfully have upon the ship, in respect of a jettison or sale of goods (*g*).

Thirdly, at common law, and except so far as this rule has been modified by statute, the shipowner who enforces a right of lien must do so at his own expense (*h*). If he were to land and store the goods, or deposit them with a wharfinger, his position at common law was, that, even if he did not by such an act lose that possession of the goods on which his right of lien depended, at any rate

(*f*) As to the law with regard to the making of tenders in cases of disputed liability, see *Scarfe v. Morgan* (1838), 4 M. & W. 270; *Allen v. Smith* (1862), 12 C. B. (N. S.) 638, affirmed (1863), 9 Jur. (N. S.) 1284 (Ex. Ch.); *Ashmole v. Wainwright* (1842), 2 Q. B. 837; *Nicholson v. Chapman* (1793), 2 H. Bl. 254; *Kerford v. Mondel* (1859), 28 L. J. Exch. 303; *The Norway*, in P. C. (1865), Br. & L. 404, see pp. 410—411; per Lord Blackburn in *Ander-son v. Ocean S.S. Co.* (1884), 10 App. Cas. 107, 115; *Huth v. Lamport*, *infra*, p. 397.

(*g*) *The Norway*, in P. C. (1865), Br. & L. 410, 411.

(*h*) Mr. Lowndes added:—"If he retains the goods on board his ship, he can claim no demurrage during the delay." It is, however, argu-

able, consistently with the decision in *Somes v. British Empire Shipping Co.*, *infra*, that if the contract itself provides that a payment shall be made to the shipowner for the time during which the goods remain on board, he is entitled to payment for the whole time, although it has been prolonged by his enforcing a lien properly exercised against the goods, provided, no doubt, that he acted reasonably in keeping the cargo on board to preserve his lien. There is authority for such a rule in the case of the contract freight. (See Carver, § 683; *Moeller v. Young* (1855), 5 E. & B. 7, reversed on another point, *ib.* 755; *Mors Le Blanch v. Wilson* (1873), L. R. 8 C. P. 227; *Smailes v. Hans Dessen & Co.*, *infra*, p. 388, n. (*l*).)

the expense he was put to in storing and retaining the goods could not be recovered from the consignee (*i*).

§ 78. This state of the law was altered by the Merchant Shipping Act, 1862 (*k*), which gave to the masters and owners of ships extensive powers of enforcing a lien, whether for freight or other charges, by landing and warehousing the goods, or depositing them with a wharfinger, for this special purpose. Statutory extension of the lien.

The sections of this Act which created these powers have been re-enacted in sects. 493—501 of the Merchant Shipping Act, 1894, which provide that, at the time when any goods are landed from any ship, and placed in the custody of any person as wharf or warehouse owner, the shipowner may give notice in writing to the wharf or warehouse owner, requiring him to retain the goods subject to the claim for freight or other charges; which notice the wharf or warehouse owner is bound to act upon, under the penalty of being himself liable for any loss resulting from his omission. When such a notice has been served, the owner of the goods can only obtain delivery by depositing with the warehouse owner a sum equal to that demanded. This deposit is to be paid over to the shipowner in satisfaction of his claim, unless, within fifteen days after making it, the consignee

(*i*) See *Somes v. British Empire Shipping Co.* (1858-60), Ell. Bl. & Ell. 353, 367 (Ex. Ch.); 8 H. L. Cas. 338. At common law, the right of lien does not in general carry with it a right to sell the articles retained. (*Thames Ironworks Co. v. The Patent Derrick Co.* (1860), 1 J. & H. 93.) It would seem that in some cases, if the consignee refuses to take delivery of the goods or to satisfy the lien on them, a

master might be justified in carrying the goods back to the port of shipment, and there enforcing his lien against the shipper; on the principle that one who has a lien on goods may do what is reasonable to enforce it, and if he cannot do so on the spot without incurring expense, may carry the goods to some place where he can. (*Edwards v. Southgate* (1862), 10 W. R. 528.)

(*k*) 25 & 26 Vict. c. 63, ss. 68-78.

or representative of the cargo shall give to the warehouse owner notice in writing to retain either the whole, or such portion as he asserts to be in excess of his admitted liability. After receiving such a notice, the warehouse owner is at once to communicate it to the shipowner, who must then, within thirty days, institute proceedings to enforce his disputed claim; or else the deposit, or that portion of it which is not admitted to be due, is to be returned by the warehouse owner to the party who made it. And it is specially provided in the Act that the warehouse rent and the expenses of the wharfinger, while the goods are detained under this right of lien, shall be a charge upon the goods (*l*).

If the consignee of the goods shall make no deposit, the warehouseman or wharfinger is to detain the goods for ninety days, and at the expiration of that time (or sooner, if the goods are perishable), is to sell them, and to apply the proceeds, first in payment of his own charges, and secondly in satisfaction of the shipowner's lien, after which the balance is to be returned to the consignee (*m*).

(*l*) As to the working of the warehousing provisions of this Act, see *Miedbrodt v. Fitzsimon* (1875), L. R. 6 P. C. 306; *Smailes v. Hans Dessen & Co.* (1905-6), 11 Com. Cas. 74; 12 Com. Cas. 117 (C. A.). In the latter case the Court of Appeal held that the master had, under the circumstances of the case, acted reasonably in keeping the ship on demurrage to detain the goods on board under his lien for freight, instead of warehousing them. Channell, J., had held that he was not entitled to land them until the demurrage days had expired, but the Court of Appeal refrained from deciding this point.

(*m*) So far as Liverpool is concerned, there is a local Act (Mersey Docks Consolidation Act, 1858), which slightly varies the operation of this general Act, by providing that, as regards cargo landed in warehouses under the control of the Mersey Docks and Harbour Board, unless an action at law be commenced within the thirty days after notice given, the deposit shall be paid over, not, as under the general Act, to the owner of the goods, but to the shipowner (§§ 193-199). In other respects, the provisions of the Mersey Docks Act are identical with those set forth above. (See Appendix A.A., in

§ 79. Such are the remedies available by the owner of the ship. The owner of goods sacrificed for all, is not in so advantageous a position; simply because, not being in possession like the shipowner, he can have no right of lien. He has at common law a right of personal action against the shipowner for his share, and against the other owners of cargo for theirs (*n*). It was formerly doubted whether he had the right, as in some countries, to proceed against the shipowner in the first instance for the entire

Remedies of cargo-owner in case of jettison.

which both Acts, so far as they bear on this subject, are given at large.)

(*n*) *Dobson v. Wilson* (1813), 3 Camp. 480. Mr. Carver raises the question whether, if the property in the goods is transferred during the voyage, the owner who is liable to pay the contribution is the owner at the time of the general average loss, or the owner at the time when the goods reach their destination. (See Carver, § 443.) The question is one of little practical importance, not only because the consignee of the goods is usually compelled to make himself liable to pay the contribution in order to obtain delivery of the goods, but also because they are usually insured, and, as a rule, when they are sold while at sea the benefit of the insurance is assigned to the purchaser. In *Scaine v. Tobin* (1832), 3 B. & Ad. 523, as Mr. Carver points out, Lord Tenterden said that "A consignee, who is the absolute owner of the goods, is liable to pay general average, because the law throws upon him that liability." But, as Mr. Carver admits, it does not appear whether this dictum was intended to apply to a consignee who had become owner after the general average loss had been incurred; and Parke, B., observed in the course of the argu-

ment that "the plaintiff was bound to show that the defendant was an owner at the time when the general average accrued." Mr. Carver suggests that the true view may be that the liability is only inchoate, and does not definitely attach until the goods have arrived at the destination, or other place where the voyage is terminated. The editors submit, however, that the person liable to pay is he for the preservation of whose property the loss was incurred, *i.e.*, the owner at the time of the loss. This view agrees best with the various doctrines which have been promulgated with reference to the basis of general average (see *ante*, § 3); and there is no legal difficulty in annexing to the rule the qualification that in cases of sacrifice the safe arrival of the goods is a condition precedent to the enforcement of the liability. Moreover, if as regards expenditures the correct view is that all the property must contribute which was at risk at the time when the expenditure was incurred, whether afterwards lost or not, the doctrine that the liability is only inchoate at the time of the loss can only be maintained by treating this, perhaps the most important, class of general average losses as an exception to the general rule.

value of the goods short delivered, leaving the latter to collect the general average from each contributor; and it was supposed that to such an action it would be a sufficient defence, that the jettison or similar sacrifice was occasioned by the dangers of navigation.

As a matter of convenience, however, the shipowner, who has it in his power to take security for the general average before parting with the cargo, and who, in most cases of jettison, is himself a claimant in respect of the loss of freight resulting from it, usually deals with the entire claim, acting as receiver and distributor on behalf of all. Any other arrangement would lead to great complications, and could hardly be carried out in practice. We have to consider, then, to what extent the shipowner is by law empowered or bound so to act.

Shipowner
empowered
to take secu-
rity for jet-
tison.

The first case in which this question directly came before the courts was that of *Hallett v. Bousfield*, in 1811 (o).

The owner of a quantity of bark, which had been jettisoned to save the ship *Ocean* and her cargo, moved for an injunction in the Court of Chancery to restrain the master and shipowner from delivering any part of the cargo, and receiving the freight, or parting with any share of the ship; he insisting on a lien for contribution. In support of this motion it was argued that the general commercial law binds the shipowner before delivering the cargo to the consignees, to take security from them for their shares of the general average, and to provide for the adjustment at a future time by an equal contribution. The usage of Lloyd's was also cited, as requiring the owner to insist on the signing of an average-bond before parting with the goods. Lord Eldon, however, refused to grant an injunction. No

principle, he said, would justify the administration of law and equity according to the usage of Lloyd's Coffee-house. "It seems to me," added the learned judge, "that in such case there is a lien upon the goods of each freighter for contribution and average in some sense: that is, the master is not bound to part with any of the cargo, until he has security from each [consignee] for his proportion of the loss; but there is no authority that, on the ground that he has a lien to the extent of entitling him to call on every person to give security for the amount of their average when it shall be adjusted, every owner of a part of the cargo can compel the captain to do so" (*p*).

In *Crooks v. Allan* (*q*), in 1879, a successful attempt was made to put this matter on a more satisfactory basis. A general cargo was shipped from Liverpool under through bills of lading for Toronto, to be carried as far as Montreal by the steamer *Sardinian*, belonging to the defendants, under a bill of lading, by which the defendants undertook to deliver the goods at Montreal to the Grand Trunk Railway there in the usual manner, but on certain conditions, amongst which was the following clause:—"The shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance." These words formed part of a very long list of exceptions and conditions, all printed in such very small type as, in the language of Lush, J., who tried the case, "not only not

Duty of shipowner to take security for benefit of cargo-owners.
Crooks v. Allan.

(*p*) In commenting on this case in *Strang v. Scott* (1889), 14 App. Cas. 601, Lord Watson observed (*p*. 607): "Courts of equity are chary of granting injunctions which may lead to inconvenient results; and it does not follow from *Hallett v. Bousfield*

that a master might not be restrained from making delivery of the cargo, at the instance of all or most of those entitled to contribution, without taking security for their claims."

(*q*) 5 Q. B. D. 38; 49 L. J. (Q. B.) 201.

to attract attention to any of the details, but to be only readable by persons of good eyesight." The clause in question came in about the middle of thirty closely packed small type lines, without a break sufficient to attract notice. It is true that at the end of these thirty lines it was added: "In accepting this bill of lading, the shipper, or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed." But it was not proved, as under these circumstances the learned judge thought it ought to have been, that the special clauses in question had been brought to the notice of the shippers, or read to them before they accepted the bill of lading.

The *Sardinian*, after sailing, took fire at sea, which made it necessary, in order to protect the whole from destruction, to flood the cargo with water, thus occasioning a general average loss to the plaintiff's goods. The ship returned to Liverpool, and there the shipowners, conceiving they were not liable for the damage to the cargo, and not proposing themselves to make any claim upon the cargo, took no steps as to collecting a general average, but simply discharged the damaged cargo, and handed it over to the Liverpool Salvage Association (*r*), to be distributed and disposed of as might be most for the benefit of the parties concerned.

The plaintiff, one of the shippers, whose goods had thus been damaged, was not satisfied with the course adopted by the shipowners, and brought an action

(*r*) An association, formed by the underwriters of this city, to organize a system of concerted action in case of wreck or maritime disaster, so as to minimize the loss by providing machinery for disposing of the pro-

perty saved to the best advantage, sending out agents to ships in distress, and in other analogous methods. There is another similar institution in London.

against them in the Queen's Bench Division. The complaint made was, "that the shipowners refused to give any assistance to enable either the association, or the underwriters, or the persons whose goods were so damaged, to get an average statement made out, or to take any steps to enable the plaintiffs to recover contribution. They delivered up the cargo without taking the usual security from any of the owners of cargo, and the plaintiffs were not only without the benefit of such security, but without the means of ascertaining in what proportions the several cargo-owners were liable to contribute, or even who, besides the defendants, were the contributing parties (*s*).

The case was tried at the Liverpool Assizes, before Lush, J., by whom it was reserved for further consideration. It was re-argued before his lordship in London in the Queen's Bench Division, and judgment given for the plaintiffs.

The learned judge, in the first place, dealt with the question of the shipowner's liability to contribute, notwithstanding the clause above referred to; which he affirmed on the authority of *Schmidt v. Royal Mail S.S. Co.*, and on virtually the same grounds (*t*).

"The next question is," his lordship continued, "whether a shipowner is bound to exercise the power he is invested with, when a general average loss has arisen, and to afford the means in his power for adjusting the general average claims and liabilities, and secure their payment to the parties entitled. It seems strange that such a point has not been formally decided in this country. It has been decided in America in favour of the shipper. I am not aware that it

(*s*) (1879), 5 Q. B. D., at p. 39.

(*t*) (1876), 45 L. J. (Q. B.) 646.

In this case the words relied on exempted the ship from liability from "fire and the consequences thereof;"

and this was held not sufficient to exempt the ship and freight from contribution to a general average resulting from the measures taken to extinguish a fire.

has ever been judicially questioned here, and I can only account for the absence of direct authority by supposing that the universal practice has been accepted as proof of the obligation. It is clear that the shipowner has a lien for general average on the whole of the cargo liable to contribution, and can require, before he parts with it, security for its due payment. In early times the master, when he had jettisoned part of the cargo to save the whole adventure, took and rendered contribution in kind. The ordinary course now is, and has been for a very long time, for the shipowner to require before he delivers the cargo, an average bond or agreement for the payment of what shall be found due from each shipper for his proportion of the loss. He is the only person who has the power to require this security.

“The right to detain for average contribution is derived from the civil law, which also imposes on the master of the ship the duty of having the contribution settled, and of collecting the amount, and the usage has always been substantially in accordance with this law, and has become part of the common law of the land.

“I am therefore of opinion, first, that the bill of lading does not exempt the shipowner from contribution to a general average loss, and, secondly, that he is liable to this action for not having taken the necessary steps for procuring an adjustment of the general average and securing its payment. This is all which I am required to decide, and my judgment will therefore be entered for the plaintiffs with costs” (*u*).

As a result of this decision, I am in a position to state that the shipowners collected and gave the requisite information, and caused an adjustment of general average to be drawn up, which was settled by all parties concerned, including the shipowners and their underwriters, without further question (*x*).

(*u*) 5 Q. B. D. 38, at p. 41.

(*x*) The rule laid down in this decision, that it is the duty of the master to enforce the lien for a general average contribution against each parcel of goods for the benefit of the owner of goods sacrificed for the common benefit, was affirmed by the Privy Council in *Strang v. Scott* (1889), 14 App. Cas. 601; and in *Nobel's*

Explosives Co. v. Rea (1897), 2 Com. Cas. 203, Mathew, J., held that the shipowners were liable in damages to the owners of goods jettisoned for delivering the rest of the cargo without taking security from the consignees for their respective contributions. (Accord. *The Santa Ana* (1907), 154 Fed. R. 800.)

§ 80. With regard to the average bond or agreement referred to in the above judgment, as having for a long time been customarily used by shipowners as a convenient step in the carrying out of the duty thus incumbent upon them, a decision of some importance was subsequently given.

Average
agreements.

By way of introduction it may be explained that when a ship arrives at its port of destination subject to a claim for general average, the shipowner finds himself in a position of some difficulty. An obligation, it is now clear as it has long been thought, is imposed on him, not to part with the goods until he has taken reasonable measures towards enforcing, as against each consignee, the lien which exists at the moment of the ship's arrival. This he can only do either by detaining the goods, or by taking from the consignee, before parting with them, some fair equivalent in the shape either of a deposit of money or satisfactory engagement to pay. But it greatly concerns the merchant to obtain his goods without delay, so as not to lose his market: while it is impossible for the shipowner, without some, and often a long delay, to ascertain the exact amount payable. Some reasonable arrangement, therefore, has to be come to: and it is by no means easy to determine what arrangement would be reasonable, so as to balance the conflicting claims of shipowner, merchant, and underwriter.

There has been [said Mr. Lowndes in 1888], as far back as I can recollect, certainly for the last fifty years, a difference of practice in this matter between London and Liverpool. The old London practice was to deliver the goods, unless perhaps in exceptional cases, upon a simple undertaking signed by the consignee, that he will pay his share of general average when called upon. The

Liverpool shipowners were not satisfied with this: they named the adjuster and required the consignee to engage to pay the sum which this adjuster should allow as his share: thus virtually making the adjuster a sort of arbitrator between them. When the amount at stake was large, they further required the consignee to deposit with them a sum sufficient to cover it. One or other, at least, of these two conditions they usually insisted on before parting with the goods.

From this difference in the method of working pursued in two great cities so closely connected together, there inevitably arose a good deal of friction: and some years ago a serious effort was made to reform the practice of Liverpool. The underwriters especially complained that, owing to the power given by the existing system to the adjusters, an underwriter might find himself practically precluded from questioning an adjustment, because it was binding on his assured, although he himself had no voice in the selection of the adjuster, nor opportunity for offering arguments, explanations, or evidence, in support of his view of the question. Conferences were held between representatives of the Shipowners' Association, Chamber of Commerce, and Underwriters' Association, and after long discussion, a new form of average agreement was adopted, which received the sanction of all three bodies. The old Lloyd's form was universally felt to be too lax to be applicable [in Liverpool]: indeed, there was reason to believe that, in London itself, though nominally recognized, it was, on most occasions of importance, superseded by something considerably more stringent. All that could be done, then, at these conferences, was to reform the abuses which had grown out of the old Liverpool form. This was done by providing—first, that

there should be a sort of appeal against the conclusions of an adjustment by means of a reference to arbitration in case of objection within a limited time; secondly, that the amount of deposit should be fixed by the adjuster, and paid into his hands as a stakeholder conjointly with the shipowner. This state of things—Liverpool using its amended form, and London, at least nominally, adhering to the old Lloyd's form—continued for, as far as I remember, eight or ten years at least. It has been broken in upon by the following decision.

The steamship *Thales* (y), on her voyage from Buenos Ayres for Liverpool, grounded near Bridport, and part of her cargo was jettisoned, after which, by the assistance of several tugs, the vessel was got off and proceeded on her voyage. On her arrival at Liverpool, the plaintiffs, who were consignees of cargo, applied for delivery of their goods, which was refused by the shipowners except upon condition that they would sign an average bond in the Liverpool form, and make a deposit of 10 per cent. on the value of their goods; which was to be made, either, as provided by the bond, in the joint names of the shipowner and adjuster, or in the name of the shipowner alone, or of the adjuster alone. This the consignees refused to do; but offered to sign the London form of bond, and to pay 10 per cent. on the value of their goods into a joint account either of themselves and the shipowners, or of nominees of them both. This being declined by the shipowners, the merchants paid under protest, and immediately brought an action against the shipowners to recover the sum so paid and damages for detention of their goods.

This raised the question of the right of the ship-

(y) *Huth v. Lamport*, *Gibbs v. Lamport* (1855-6), 16 Q. B. D. 442, 735 (C. A.).

*Huth v.
Lamport.*

owner to detain the goods in this manner, and, incidentally, of the reasonableness of the Liverpool form of bond. It was tried in the Queen's Bench Division, before Mathew and Smith, JJ., and decided in favour of the plaintiffs.

"It appears to me," said Mathew, J., "our judgment must be for the plaintiffs in each case. The case has not been stated with a view of having the question determined, whether according to the custom of merchants and the law of England a shipowner is entitled in every case where there is a claim for general average to retain the cargo until payment of the amount has been made. It might be necessary to decide that formally and deliberately if any such right had been asserted in this case by the owner of the ship. Mr. Finlay referred—I will not do more than say referred—to the matter, because he did not argue it at any length, but he appeared to say that, when the time came and when the proper case arose, he would be prepared to assert that the authorities show that such a right as I have referred to exists. The only cases he was able to call our attention to, were the cases of *Simonds v. White* (z) and *Crooks v. Allan* (a). It is sufficient

(z) (1824), 2 B. & C. 805. In this case an English shipper of goods sued an English shipowner to recover back an amount which he had been forced to pay at St. Petersburg, the ship's port of destination, by the enforcement at that place of the ship's right of lien, as contribution to a general average there adjusted, rightfully according to the laws of Russia, but in excess of what would have been due according to English law. Abbott, C. J., in delivering the judgment of the Court of Queen's Bench, said: "The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not

so much upon the terms of any particular instrument as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded, by the special terms of a contract, as between the parties to the contract; but there is nothing of that kind in any contract between the parties to this cause. There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle. But on one point all agree, namely, the place at which the average shall be adjusted, which is, the place of the ship's destination or delivery of her cargo. I believe also that all are agreed on another point, namely, that the master is not compellable to part with the possession of goods until

(a) (1879), 5 Q. B. D. 38.

to say that neither of those authorities in my judgment justify him in the argument that any such right exists : but in this case it is perfectly clear that no such right was insisted upon. If it had been a question of lien, and if the shipowner had called upon the consignee to deal with his lien, the question of amount would immediately have presented itself, and a more onerous and difficult position for a shipowner to place himself in cannot be imagined. He would be bound to give up the goods upon having a proper tender made to him. In order to enable a proper tender to be made, he would be bound to give the necessary information to the consignee ; and then he would run very great risk of asking too much or too little, a risk to the other consignees in the one case, and a risk to the particular consignee in the other. But no such position was taken up by the shipowner. What the shipowner insisted upon was upon the bond being in the Liverpool form. He conveyed to the consignees, that he was willing to take security, but he insisted that it should be in the form of what has been called the Liverpool form. The question presented to us, as I understand, is, whether that bond is such a security as a shipowner might reasonably demand.

“It appears to me perfectly clear to be unreasonable in two particulars ; first, in insisting upon making the Average Adjuster the arbitrator in the first instance with a complicated arrangement for an appeal from his decision ; and secondly, in insisting upon payment over of the deposit money, either to the owner of the ship himself or to the owner and some average adjuster, so that the money is placed for a time entirely out of the reach of the consignee of the goods ; and that money, according to the terms of the bond, may be drawn upon by the owner of the ship, where the money is deposited in his name, or by the owner of the ship and the average adjuster whom he would name, in the event of its being deposited in the names of both of them. That form of average bond is to my mind unreasonable. The form of London bond, which we are told has existed for seventy or eighty years, appears to be a reasonable one ; and I should be glad if the result of our decision were to induce the shipowners of Liverpool to

the sum contributable in respect of them shall be either paid or secured to his satisfaction. This appears by the case to be the law of Russia. This power is noticed by the civil law, Dig. lib. 14, tit. 2, 2. It is ex-

pressly given by the Consulat, c. 98 ; recognized by Cleirac in his Commentary on the Jugemens d'Oleron, p. 35 ; and allowed by the French Ordinance of Marine, tit. *Du Jet*, art. 21.”

have recourse to the greater experience and wisdom of their London brethren, and adopt that form of bond " (b).

Smith, J., concurred.

The case was carried to the Court of Appeal, but there affirmed (c).

Lord Esher said :

"The order of the Queen's Bench Division must be affirmed, though I do not think that the grounds of our decision will be satisfactory to either of the parties. The defendants' ship arrived at the port of destination, after a voyage in which a general average loss had occurred. The plaintiffs as owners of goods on board the ship were liable to contribute to this general average loss. The defendants, as shipowners, had a lien on all the goods on board to secure payment by each owner of his proportion of this general average, and were entitled to refuse to deliver goods to any consignee of the cargo until they were paid the amount of the general average to which he was liable, and they were not bound to accept security for the amount due in lieu of immediate payment. The result is that each consignee must pay the amount which is demanded by the shipowner for general average, or must at his own risk tender what he thinks is his proper proportion. Of course the master would have no right to insist upon payment of an arbitrary sum without furnishing the necessary account of particulars, to enable the owner to ascertain how this amount became due. If the master refused to furnish such particulars the case would come under the rule laid down by Dr. Lushington in *The Norway* (d), and the consignee would not be prejudiced by not having made a sufficient tender. But if after giving all proper information the master were to say, 'you must either pay the amount which I demand from you, or you must pay the right sum,' the owner of the cargo could not insist upon paying the amount into a bank in the name of persons other than the shipowner, but must pay him either the amount demanded, or tender that which he, the consignee, believes to be reasonable. If, however, the master had said that whatever might be the amount of the sum tendered by the consignee, he would accept nothing but a particular security, then the question would arise whether the security,

(b) (1885), 16 Q. B. D. 442, at p. 444.

(c) (1886), 16 Q. B. D. 735.

(d) (1864), Br. & L. 377, 397.

which he demanded, was a reasonable one. If he says that he will only accept a deposit of 10 per cent. on the value of the goods, this, as a general rule, would be wholly unreasonable, though there might be cases where it would be reasonable. We must consider whether in the present case it is unreasonable having regard to the other conditions respecting it. The bond requires that the deposit shall be made in the joint names of the defendants and 'their average adjuster.' The word 'their' clearly points to an adjuster appointed by themselves. Then the shipowner is to have power to draw upon it from time to time for his disbursements. This includes all disbursements and payments, which in the result the shipowner will have to pay for himself. Take the case of salvage. The ship is in distress and is succoured by salvors, and the master makes a compromise with them for the payment of a large sum, and it may turn out upon the final settlement that a large part of the salvage will fall on the shipowner, and yet under the terms of the bond the master is to be at liberty to take the whole amount of the salvage out of the deposit, the only security for the repayment of what ought to be returned being the credit of the shipowner.

"If the shipowner requires the consignee to enter into a bond in particular terms, the question arises whether the bond is unreasonable, and if part of what is insisted upon is unreasonable, the whole instrument is unreasonable. That the bond is unreasonable, considered as one which the master may impose on the consignee, is, I think, clear. First, it makes the shipowner's average adjuster an arbitrator, and that is unreasonable. Then there is a peculiar kind of appeal from the decision of the average adjuster, which prevents the parties from taking the opinion of a legal tribunal. Further, the terms of the deposit are unreasonable, inasmuch as it requires a deposit in the joint names of the representative of the shipowner and the average adjuster. Then as to the mode in which payments are to be made out of the deposit. The average adjuster of the shipowner is to be the judge, and what purports to be a deposit is to be drawn upon for such disbursements as these two, without the consent of the depositor, think ought to be paid to the shipowner. For these different reasons the bond is one which, I think, the Liverpool shipowners have no right to impose upon the owner of any cargo which arrives there.

"The case does not enable us to compare this form of bond with the form called the London bond, and I therefore give no opinion as to whether the latter form is reasonable or not."

Lindley, L. J. :

"I am unable to say that the decision of the court below was wrong. The right of the master to refuse to deliver goods to a consignee, unless he is paid the consignee's share of general average, appears, up to a certain point, to be clear. I say up to a certain point, because if the amount due is paid or tendered, the master cannot refuse delivery. It is unnecessary to say whether he can refuse if reasonable security is offered. But if no question of payment or tender is raised, and he himself requires security, he cannot impose unreasonable terms. The question here is, can the defendants insist upon the consignee's doing one of two things, to make the deposit as described in the case, or in the alternative to sign the Liverpool bond. As to the first alternative, when you ascertain that the object of the deposit is to give the master control of the money for the benefit of the shipowner, I cannot think that it is reasonable. As to the second I agree that the bond is not one which can be imposed upon a consignee against his will."

Lopes, L. J., concurred.

Underwriters'
guarantees.

[§ 80a. It is the usual practice of the consignees of the cargo, when they have been obliged to make a cash deposit in order to obtain delivery of their goods, to claim the amount of the deposit from their insurers, who generally agree to reimburse them this amount in whole or in part, according as the goods are fully or only partly insured. The assured then hand over to the insurers the receipt given for the deposit, sometimes accompanied by a formal assignment to the insurers of their interest in the deposit, up to the amount provided by the insurers.

Owing to this circumstance another method of providing security for the payment of the cargo's contribution to general average, viz., the substitution for a deposit of a guarantee given by the underwriters of the cargo, has come widely into use since the last edition of this work was published. This method has proved a

very convenient one in the majority of cases, to the cargo-owner because he is not called upon to make a cash deposit, to the shipowner where, owing to the lack of sufficient information, the amount which ought to be collected from the consignees of the cargo by way of deposit cannot be estimated correctly.

There is no form of guarantee in use which is recognized as the standard form (*e*), although attempts have recently been made to draft one which would prove acceptable to all the interests concerned.

The question remains to be considered, whether a shipowner who accepts a guarantee, instead of requiring a deposit, fulfils his duty to the cargo-owner to whom a general average contribution is owing. In one respect a guarantee can never be as good a security as a deposit of money, for it may become inadequate or even valueless through the insolvency of the guarantor. It may therefore be argued that a shipowner fails in his duty to the cargo-owner, if he agrees to substitute a guarantee for a deposit. It must, however, be remembered that in another respect a guarantee of the whole amount of the contribution may be a better security than a deposit; for the amount of the contribution is uncertain at the time when the security is given, and there is a possibility that it will exceed the deposit.

The editors submit that the shipowner fulfils his obligation if he obtains such security for the payment of the contribution as a prudent man would be content to take for his own benefit (*f*). The guarantee of the

(*e*) A form, entitled "Lloyd's General Average Guarantee," which has been adopted for some years by the Committee of Lloyd's as their official form, is set out in Appendix BB, *infra*.

(*f*) The judgments of Mathew, J., and Lindley, L. J., in *Hoth v. Lamport, ante*, pp. 399, 402, suggest that the shipowner's duty is to take reasonable security. Even a trustee is not expected, save in the invest-

Corporation of Lloyd's or that of an English insurance company of high standing seems amply to satisfy this test; but the shipowner would perhaps incur responsibility if he took the guarantee of a foreign corporation or underwriter against whom all the remedies given by English law might not be available.

There can be no doubt, in the opinion of the editors, that a guarantee for a part only of the contribution would not be a sufficient security.]

SECTION II.—ADMIRALTY JURISDICTION.

§ 81. Notwithstanding the amalgamation of the Admiralty and Common Law Courts by the Judicature Act, 1873, it is still necessary for several purposes to mark distinctly the jurisdiction of the High Court of Admiralty in matters of general average, if only as assisting to define the extent of jurisdiction in such matters given by statute to the county courts.

The Court of Admiralty, which from its mode of procedure would seem to have especial facilities for dealing with questions of general average, had for many years persistently refused to touch them, as being outside its jurisdiction(*g*). There was, however, one case in which such a duty was forced upon it: namely, when there was in the custody of the court a fund, representing the proceeds of the cargo, and when claims for general average were made against that fund, in virtue of the shipowner's right of lien. In such a case, the Court of

ment of the trust funds, to take greater precautions in managing trust affairs than an ordinary prudent man of business would take in managing similar affairs of his own. (Per Lord Blackburn, in *Speight v.*

Gaunt (1883), 9 App. Cas. 1, 19; per Lord Watson, in *Leuroyd v. Whiteley* (1887), 12 App. Cas. 727, 733; Lewin on Trusts, 12th edit. pp. 327, 373.)

(*g*) *The North Star* (1860), Lush. 45.

Admiralty, being under the necessity of determining to whom the surplus of the fund in question should be paid out, was and still is compelled incidentally to adjudicate on the question of general average thus brought before it.

In the case of *The Galam* (*h*), the ship, which was carrying a cargo subject to a respondentia bond springing out of an accident before shipment in that vessel, was driven ashore on one of the Scilly Islands, and was rescued under circumstances which gave rise to a claim for general average. The consignees not having paid off the respondentia bond, the cargo was arrested at the suit of the bondholder, and sold under an Admiralty decree, and the proceeds were lodged in the registry of that court. The captain, who had made himself liable for the expenses constituting the general average, laid claim on these proceeds for the cargo's share. This claim was rejected by Dr. Lushington, on the ground that the Court of Admiralty never dealt with questions of general average; but, on appeal to the Privy Council, this decision was reversed, and the master's claim admitted.

Lord Kingsdown, in giving judgment, pointed out that, though the master would have no right, after parting with possession of the cargo, which would put an end to his right of lien, to go before the Court of Admiralty and request that court to enforce his claim; yet this was entirely different from his present application, which was simply, that the court would not take the property out of his hands without giving effect to that right of lien which he himself at that moment had as against the owner of it, and against the respondentia bondholder who claimed it in the name of the

(*h*) *Cargo ex Galam* (1863), Br. & *nom. Cleary v. M'Andrew*, 2 Moore, L. 181; 33 L. J. (Adm.) 97; S. C., P. C. C. (N. S.) 216.

cargo owner. This latter demand, the court determined he had a clear right to make (*i*).

Admiralty
Amendment
Act; effect of.

A more extended and immediate jurisdiction in questions of general average was imposed upon the Court of Admiralty, by the Admiralty Court Act, 1861 (*k*).

This Act provides, by § 6, that “the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that, at the time of the institution of the cause, any owner or part-owner of the ship is domiciled in England or Wales . . .” (*l*).

This clause, it will be seen, gives to the owners of cargo, in certain cases, a right of proceeding in Admiralty, and, as a consequence, a right of arresting the ship, practically equivalent to the common law lien which the shipowner has upon her cargo. It becomes a matter of importance, then, to consider to what extent, if at all, this right is applicable to claims for jettison or short delivery of cargo resulting from a general average act. On this subject there have been the following decisions:

(*i*) *Cargo ex Galam* (1863), Br. & L. 167, at p. 181; 33 L. J. (Adm.) 97; S. C., *nom. Cleary v. M. Andrew*, 2 Moo. P. C. C. (N. S.) 216. See also *The Sublomsten* (1866), L. R. 1 A. & E. 293.

(*k*) 24 Vict. c. 10.

(*l*) This statute, being remedial of a grievance, by amplifying the

jurisdiction of the Court of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow.” (*The Piece Superiore* (1874), L. R. 5 P. C. 482, at p. 492.)

In the case of *The Ironsides* (*m*) it was decided that, since the terms of the Act referred only to the case of goods *carried into* a port in England or Wales, there could be no right to proceed in Admiralty against the ship in the case of a complete non-delivery of the claimant's goods; but this decision must be taken to be overruled by the later case of *The Danzig* (*n*), where it was held that the word "carried" must be read as meaning "intended to be carried," so as to give the same claim when all the cargo, or the whole of a parcel comprised in one bill of lading, is wrongfully short-delivered, as when only a part of it is so.

Act only applicable to case of goods delivered in England or Wales.

The goods, however, must have been either actually delivered, or intended to be delivered, at a port in England or Wales. Where the voyage is to some foreign port, and the alleged breach of contract consists in the non-delivery there, the statute gives no jurisdiction (*o*). But if, though the voyage be to a foreign port, the goods have in fact been carried into a port in England, the court has jurisdiction: as, where the goods were intended for Dunkirk, and the ship by stress of weather was taken into Ramsgate, and there the master refused either to go on to Dunkirk or to give delivery at Ramsgate (*p*).

The case of *The Norway* determines that it is a breach of duty or of contract, bringing the case within the Admiralty jurisdiction, for the master of a ship.

The Act gives a remedy in case of withholding information;

(*m*) (1862), Lush. 458.

(*n*) (1863), Br. & L. 102.

(*o*) *The Kasan* (1863), Br. & L. 1.

(*p*) *The Bahia* (1863), Br. & L. 61; *The Patria* (1871), L. R. 3 A. & E. 436; and see *The Piece Superiore* (1873), L. R. 4 A. & E. 170; where it was held that the mere calling at an English port for orders gave

jurisdiction, so that the ship could be arrested on subsequently coming to England without her cargo. (Affirmed in P. C. (1874), L. R. 5 P. C. 482.) This, however, does not give a maritime lien on the ship; therefore there would be no liability in the hands of a subsequent purchaser. (S. C. at p. 491.)

who has thrown cargo overboard, and who retains the cargo for payment of a deposit claimed for general average, to withhold from the consignee such information as will enable him, not merely to ascertain for himself whether the amount of deposit claimed is reasonable, but also to compute his own counter-claim for jettison. It is likewise such a breach of contract, if the master insists on a larger deposit than the difference between his claim on the consignee for general average, and the consignee's counter-claim on the ship for the ship's share of the loss by jettison (*q*).

and in case of
demanding
excessive
deposit.

Dr. Lushington in this case laid it down as being the duty of the master, when he demands a deposit for general average, to furnish the consignee, besides surveys and other proofs of loss, and the particulars of the jettison, with "some memorandum from an average adjuster as to the probable amount of contribution from the cargo for the general average" (*r*). [In *Wavertree Sailing Ship Co. v. Love* (*s*), however, the Privy Council held that the shipowner is not bound to employ an average adjuster; "if he engages the service of one, it is merely," said Lord Herschell, "as a matter of business convenience on his part" (*t*).]

In *The Norway*, one "breach of duty" alleged was, that the grounding which necessitated the jettison arose from the negligence of a non-compulsory pilot. The judge of the Admiralty Court held that this was proved: but on appeal to the Privy Council the judgment was on this point reversed, and the jettison was treated as a general average (*u*). This average, as forming part of

(*q*) *The Norway*, in P. C. (1865),
Br. & L. 410-411.

(*r*) *The Norway* (1865), Br. & L.

397-398.

(*s*) [1897] A. C. 373.

(*t*) *Ib.* p. 380.

(*u*) Br. & L. 407-408.

the matter in litigation, was adjusted in the Admiralty Registry.

It does not appear from any reported decision that the mere short-delivery of cargo, if resulting from jettison or other accident of navigation, can be considered as by itself constituting such a "breach of contract" as to give to the consignee a right to arrest the ship under Admiralty process, for the mere purpose of obtaining security for his debt. It is conceived, however, that a refusal on the part of the master to pay the ship's share of the general average when demanded, or perhaps his refusal to give an undertaking not to quit the port until the debt has been paid or secured, or the making of preparations to depart before doing so, might be held to bring the case within the terms of the Act.

By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (*x*), County Courts, whenever the amount claimed does not exceed 300*l.*, have the same jurisdiction, as regards claims of this nature, which is possessed by the High Court of Admiralty (*y*).

Application
of the Act to
jettison.

Jurisdiction
of County
Courts.

(*x*) 32 & 33 Vict. c. 51.

(*y*) In *Cargo ex Argos* (1873), L. R. 5 P. C. 134, the Privy Council laid it down that the Admiralty jurisdiction of the county courts is in fact more extensive than the original jurisdiction of the Admiralty Court, and includes all cases which fall within the comprehensive words of the Act—that is to say, to "any claim arising out of any agreement made for the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship," up to the amount of 300*l.*

And this decision was followed by the Court of Appeal in *The Alina* (1880), 5 Ex. D. 227. By these decisions, *Simpson v. Blues* (1872), L. R. 7 C. P. 290, in which it was held that the jurisdiction conferred by the Act did not extend to cases which were not within the jurisdiction of the Admiralty Court, has been overruled. There is, however, no jurisdiction under the Act to entertain a claim for the loss of a passenger's luggage, which is not "goods" within the meaning of the Act. (*R. v. City of London Court* (1883), 12 Q. B. D. 115.)

APPENDIX A.

THE ROMAN CIVIL LAW.

THOSE portions of the Digest and Institutes of Justinian which bear on this subject are brought together in a convenient form, and illustrated by copious notes, in the first volume of M. Pardessus's "*Collection de Lois Maritimes*," from which the following extracts are taken. For convenience of reference, I have arranged the topics, so as to follow as nearly as possible the order in which the different branches of the subject have been treated in this volume.

SECTION 1. WHAT LOSSES ARE THE SUBJECT OF GENERAL AVERAGE.

1. *Lege Rhodiâ cavetur, "ut, si levandae navis gratiâ jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est."*

2. *Si conservatis mercibus deterior facta sit navis, aut si quid exarmaverit, nulla facienda est collatio, quia dissimilis earum rerum causa sit, quae navis gratiâ parentur, et earum pro quibus mercedem aliquis acceperit: nam et si faber incudem vel malleum fregerit, non imputaretur ei qui locaverit opus: sed, si voluntate vectorum, vel propter aliquem metum, id detrimentum factum sit, hoc ipsum sarciri oportet.*

1. The Rhodian law decrees that, if goods are thrown overboard to lighten a ship, all shall make good by contribution that which has been given for all (*a*).

2. If, the goods being preserved, the ship suffers damage or loses any of her tackling, there shall be no contribution, there being no distinction between things provided for the use of the ship and other things for which a man receives hire or payment: for, if a smith breaks his anvil or hammer, he cannot charge it against the person who employed him on the work. But if it is by the will of the passengers (*b*), or on account of some danger, that this damage was done, this must be made good (*c*).

(*a*) Dig. Lib. 14, Tit. 2, Fr. 1, 1 Pard. 104. M. Pardessus is of opinion that this sentence contains all that the Romans really borrowed from the Rhodians (Vol. 1, p. 23), and that the Rhodians in turn borrowed it from the Phœnicians (Vol. 1, Intr. xxix.).

(*b*) "*Vectores*" may be translated passengers or merchants on board. The context shows that there were sometimes "*vectores sine sarcinâ*," passengers who had no wares; but this was probably exceptional. (See 1 Pard. 105, n. 3.)

(*c*) Dig. Lib. 14, Tit. 2, Fr. 2, § 1, 1 Pard. 105.

3. Cùm arbor, aut aliud navis instrumentum, removendi communis periculi causâ, dejectum est, contributio debetur.

4. Arbore caesâ, ut navis cum mercibus liberari possit, aequitas contributionis habebit locum.

5. Si navis à piratis redempta sit, Servius, Ofilius, Labeo, omnes conferre debere aiunt. Quod verò prædones abstulerint, eum perdere ejus fuerit; nec conferendum ei quì suas merces redemerit.

6. Navis onustae levandae causâ, quia intrare flumen vel portum non potuerat cum onere, si quaedam merces in scapham trajectae sunt, ne aut extra flumen periclitetur, aut in ipso ostio vel portu, eaque scapha submersa est, ratio haberi debet inter eos qui in nave merces salvas habent, cum his qui in scaphâ perdiderunt, proinde tanquam si jactura facta esset. . . . Contrâ, si scapha cum parte mercium salva est, navis periit, ratio haberi non debet eorum qui in navi perdiderunt, quia jactus in tributum nave salvâ venit.

3. When a mast or other appurtenance of the ship is cut down for the sake of removing a common danger, contribution is due (*d*).

4. When a mast is cut, that the ship with the goods may escape, the equity of contribution shall come in (*e*).

5. If a ship has been ransomed from pirates, Servius, Ofilius, Labeo, all agree that there should be a contribution. But what the robbers have taken away, he must lose whose property it was: nor shall there be a contribution for him who has ransomed goods of his own (*f*).

6. If, for the purpose of lightening a laden ship, because she cannot enter a river or haven with her cargo on board, some of the goods are transhipped in a lighter, to avert danger either from remaining outside or in the harbour or port itself, and if the lighter is sunk, a contribution shall be made between those who have their goods safe in the ship, and those who have lost theirs in the lighter, just as if there had been a jettison.

If, on the other hand, the lighter with a part of the goods is saved, and the ship perishes, there shall not be a contribution towards the

d) 1 Pard. 107.

e) Fr. 5, § 1; 1 Pard. 108.

f) Fr. 2, § 3; 1 Pard. 106.

. . . Quid enim interest, jactatas res meas amiserim, an nudatas deteriores habere coeperim? Nam sicut ei qui perdidit subvenitur, ita et ei subveniri oportet qui deteriores propter jactum res habere coeperit.

7. Navis adversâ tempestate depressa, ictu fulminis deustis armamentis et arbore et antennâ, Hipponem delata est, ibique tumultuariis armamentis ad praesens comparatis, Ostiam navigavit et onus integrum pertulit. Quaesitum est an hi quorum onus fuit, nautae pro damno conferre debeant. Respondit non debere: hic enim sumptus instruendae magis navis quam conservandarum mercium gratiâ factus est.

8. Cum depressa navis aut dejecta esset, quod quisque ex ea suum servasset, sibi servare respondit, tanquam ex incendio.

loss of those in the ship, on the plea that a jettison would have been contributed for if the ship had been saved (*g*).

. . . What difference does it make, whether by a jettison I lose my goods, or by an exposure of them for the purpose I receive them damaged? As he who loses them is compensated, so compensation should be made to him who receives his goods damaged by reason of the jettison (*h*).

7. A ship damaged in a storm, her mast and yard having been struck by lightning, was taken into Hippo, and having there been equipped for the occasion with temporary spars and gear, performed her voyage to Ostia and delivered her cargo undamaged. The question was raised whether the owners of the cargo should contribute towards the ship-owner's loss: and it was determined that they should not: for these expenses were incurred rather for the purpose of refitting the ship than of preserving the cargo (*i*).

8. When a ship is sunk or wrecked, whatever of his own property each owner may have saved, he shall keep for himself, as if rescued from a fire (*k*).

(*g*) Fr. 4; 1 Pard. 107.

(*h*) Fr. 4, § 2; 1 Pard. 108.

(*i*) Fr. 6; 1 Pard. 108.

(*k*) Fr. 7; 1 Pard. 108.

SECTION 2. COMPUTATION OF LOSSES AND CONTRIBUTING INTERESTS.

9. *Portio autem pro aestimatione rerum quae salvae sunt, et earum quae amissae sunt, praestari debet: nec ad rem pertinet, si hae quae amissae sunt pluris venire poterunt, quoniam detrimenti, non lucri, fit praestatio. Sed in his rebus quarum nomine conferendum est, aestimatio debet haberi, non quanti emptae sint, sed quanti venire possunt.*

10. *Amissae navis damnum collationis consortio non sarcitur per eos qui merces suas naufragio liberaverunt; nam hujus aequitatem tunc admitti placuit, cum jactus remedio caeteris in communi periculo, salvâ nave, consultum est.*

11. *Cum jactus de nave factus est, et alicujus res quae in navi remanserunt deteriores factae sunt, videndum an conferre cogendus sit, quia non debet duplici damno onerari, et collationis, et quod res deteriores factae sunt. Sed defendendum est, hunc conferre debere pretio praesente rerum: itaque, verbi gratiâ, si vicerum merces duorum fuerunt, et alterius asparagine decem esse coeperunt, ille cujus res integrae sunt, pro viginti conferat, hic pro decem.*

9. An apportionment is to be made according to the valuation of the property saved and of that sacrificed: nor does it affect the case if that which was sacrificed might have been sold at a profit, since the compensation is made for loss sustained, not for expected gain. But for the contributing values the estimate is to be taken, not on what they cost, but on what they might have been sold for (*l*).

10. If a ship is cast away, the loss shall not be borne by a contribution on the part of those who have rescued their goods from the shipwreck; for this equitable right is only admissible when a jettison has been purposely made for rescuing the remainder in a common danger, and when the ship is saved (*m*).

11. When a jettison has been made from a ship, and some of the goods remaining in the ship are damaged, it is to be considered whether the owner of those goods shall be compelled to contribute, seeing that he should not be burdened with a double loss, both of the contribution and of the damage done to his goods. The right view is, that he should contribute upon the present value of his goods: thus, for example, if two men had goods each worth twenty, and one by wetting was brought to the

(*l*) Fr. 2, § 4; 1 Pard. 106.

(*m*) Fr. 5; 1 Pard. 108.

Potest tamen dici etiam illa sententia, distinguuntibus nobis deteriores ex qua causa factae sunt; id est, utrum propter jacta nudatis rebus damnum secutum est, an verò alia ex causa, veluti quod alicubi jacebant merces in angulo aliquo, et unda penetravit; tunc enim conferre debebit: an ex priore causa, collationis onus pati non debet, quia jactus etiam hunc laesit. Adhuc nunquid et si aspargine propter jactum res deteriores factae sunt? Sed distinctio subtilior adhibenda est, quid plus sit in damno, an in collatione: si, verbi gratiâ, hae res viginti fuerunt, et collatio quidem facit decem, damnum autem duo: deducto hoc quod damnum passus est, reliquum conferre debeat? Quid ergò, si plus in damno erit quàm in collatione, utputa decem aureis res deteriores factae sunt, duo autem collationis sunt? Indubitatè utrumque onus pati non debet. Sed hic videamus num et ipsi conferre oporteat: quid enim interest, &c.

value of ten, he whose goods are sound should contribute on twenty, the other on ten.

In giving this judgment, however, a distinction should be made according to the cause of the deterioration; that is, whether the damage to the goods arose from their having been exposed on account of the jettison, or from some other cause, such as, that the goods were stowed in some corner where the water penetrated: in the latter case, they should contribute; in the former case they should be relieved from this burden, since their owner is himself a sufferer by the jettison. Again, how if it is by wetting on account of the jettison that the goods were damaged? Here a more subtle distinction is to be drawn, as to which is most, the damage or the contribution. If, for instance, these goods were worth twenty, and the contribution would make ten, but the damage two: deducting from this value the amount of the damage, should the remainder contribute? How, again, if the damage is more than the contribution: suppose the goods to be deteriorated by ten pounds, while the contribution is two? Undoubtedly the owner ought not to bear both burdens. But here we have to see whether contribution should not be made *to him*: for what difference does it make, &c. (*Ante*. No. 6.) (n).

(n) Fr. 4, § 2; 1 Pard. 108. The distinctions here suggested seem to indicate that the simple remedy for all these difficulties now universal, viz., the bringing in the amount made good as a contributor, had not at this time suggested itself.

12. Si navis quae in tempestate jactu mercium unius mercatoris levata est, in aliò loco submersa est, et aliquorum mercatorum merces per urinatores extractae sunt datâ mercede, rationem haberi debere ejus cujus merces in navigatione levandae navis causâ jactae sunt, ab his qui postea sua per urinatores servaverunt, Sabinus aequè respondit: eorum verò qui ita servaverunt, invicem rationem haberi non debere ab eo qui in navigatione jactum fecit, si quaedam ex his mercibus per urinatores extractae sunt; eorum enim merces non possunt videri servandae navis causâ jactae esse, quae periit.

13. Cum in eadem nave varia mercium genera complures mercatores coëgissent, praetereaque multi vectores servi liberique in ea navigarent, tempestate gravi ortâ, necessariò jactura facta erat. Quaesita deinde sunt haec: an omnes jacturam praestare oporteat; et si qui tales merces imposuissent quibus navis non oneraretur, velut gemmas, margaritas, et quae portio praestanda est; et an etiam pro liberis capitibus dari oporteat, et qua actione ea res expediri possit. Placuit, omnes quorum interfuisset jacturam fieri conferre oportere, quia id tributum ob servatam rem deberent, itaque dominum etiam navis pro portione obligatum esse; jac-

12. If a ship, which in a tempest has been relieved by the jettison of one man's goods, shall afterwards in another place be sunk, and the goods of some merchants are brought up by divers for a stated reward, it is rightly held by Sabinus that he whose goods were jettisoned to save the ship is entitled to contribution from those who afterwards recovered theirs by means of divers: but, on the other hand, that there shall be no contribution from him whose goods had been jettisoned towards those whose goods were rescued by the divers; for these last goods cannot be said to have been cast out for the sake of preserving the ship which perished (o).

13. Where in the same ship a number of merchants had shipped various kinds of goods, and also many passengers, slaves and free, were on board, a violent storm having arisen, it was necessary to make a jettison. Hereupon the following questions arose: whether all should take part in the contribution? whether those who had on board such goods as were no burden to the ship, as gems or pearls, should contribute, and if so, in what proportions; whether the lives even of freemen should be taken account of; and in what form of action the matter should be settled? It was determined, that all to whose interest it was that the jettison should be made

turæ summam pro rerum pretio distribui oportet; corporum liberorum aestimationem nullam fieri posse; ex conducto dominos rerum amissarum cum nautâ, id est, cum magistro, acturos. Itidem agitatum est an etiam vestimentorum ejusque et annulorum aestimationem fieri oporteat; et omnium visum est, nisi si qua consumendi causâ imposita forent, quo in numero essent cibaria, eò magis, quòd, si quando ea defecerint in navigationem, quod quisque haberet in commune conferret.

14. Servorum quoque qui in mare perierunt, non magis aestimatio facienda est, quam si qui aegri in nave decesserint, aut aliqui sese præcipitaverint.

15. Si res quæ jactæ sunt apparuerint, exoneratur collatio: quòd si jam contributio facta sit, tunc hi qui solverint agent ex locato cum magistro, ut is ex conducto experiatur, et quod exegerit reddat.

should contribute, because they owed this ransom on account of their property preserved; therefore that the master of the ship was likewise bound for his proportion: that the amount of the jettison should be distributed rateably on the values of the property; that freemen's lives could have no value set upon them; that the owners of the goods cast over must proceed against the master of the ship *ex conducto* (p). At the same time it was discussed whether the wearing apparel and rings of those on board were to be valued; and it was determined that everything should, except such things as were put on board in order to be consumed, under which head came provisions; and this so much the more because, in case of deficiency while at sea, whatever each one had was brought into the common stock (q).

14. As for slaves who perished in the sea, no greater valuation is to be set on them than if they had died of disease on shipboard, or had thrown themselves into the sea (r).

15. If goods which have been jettisoned are recovered, the contribution is discharged: but if the contribution has already been made, then those who have paid it may proceed *ex locato* against the master, that he may take his

(p) See note (u), p. 418.

(q) Fr. 2, § 2; 1 Pard. 105—106.

(r) Fr. 2, § 5; 1 Pard. 106.

Res autem jacta domini manet, nec fit apprehendentis, quia pro derelicto non habetur.

course *ex conducto*, and refund what he had demanded (s).

The goods jettisoned however remain the property of their first owners, for they are not to be treated as derelict (t).

SECTION 3. REMEDIES AND MODE OF PROCEDURE.

16. Si, laborante nave, jactus factus est, amissarum mercium domini, si mercedes vehendas locaverant, ex locato cum magistro navis agere debent; is deinde, cum reliquis, quorum merces salvae sunt, ex conducto, ut detrimentum pro portione communicetur, agere potest. Servius quidem respondit, ex locato agere cum magistro navis debere, ut caeterorum vectorum merces retineat, donec portionem damni praestet. Imò, etsi retineat merces magister, ultrò ex locato habiturus est actionem cum vectoribus: quid enim si vectores sint qui nullas sarcinas habeant? Planè commodius est, si sint, retinere eas. At si non, [et] totam navem conduxerit, ex conducto aget, sicut vectores qui loca in nave conduxerunt: aequissimum enim est commune detrimentum fieri eorum qui, propter amissas res aliorum, consecuti sunt ut merces suas salvas haberent.

16. If, when the ship is labouring, a jettison has been made, the owners of the goods sacrificed, if they have been shipped for carriage, should proceed *ex locato* against the master; who can then proceed against the others, whose goods are safe, *ex conducto* (u), that the loss may be distributed proportionally. Servius, however, is of opinion that they should proceed *ex locato* against the master of the ship, that he may retain the goods of the other merchants, until they have paid their share of the loss. Yes, but though the master may retain the goods, there must likewise be a right of action against the merchants (*ectores*: see note (b), p. 411), *ex locato* (x): for how if there are merchants who have no goods on board? Clearly it is more convenient, if there are any, to retain them. But if not, and if he has freighted the whole ship, let him proceed *ex conducto*,

(s) Fr. 2, § 7; 1 Pard. 107.

(t) Fr. 2, § 8; 1 Pard. 107; see also Fr. 8; 1 Pard. 109.

(u) *Locator* is he who lets his ship, or room in it, on hire: *conductor*, he who engages to pay for the use; hence the *actio ex locato*, is a suit against the master or owner of the ship, to enforce the obligations undertaken by him in letting his ship; the *actio ex conducto* is by the master against the merchants, to enforce the duties which this contract imposes upon them. (Sandars, Inst. Just. 457.)

(x) This apparently should be *ex conducto*. Instances of this confusion, says Pardessus, are not uncommon in the Roman law. (1, 105, n. 2.)

as on passengers who have hired places in a ship: for it is most equitable that the loss should fall in common amongst those who, by means of the sacrifice of other persons' property, have succeeded in obtaining their own in safety.

17. Si quis ex vectoribus solvendo non est, hoc detrimentum magistri navis non erit: nec enim fortunas cujusque nauta excutere debet.

17. If any of the merchants is insolvent, this loss must not fall on the captain; for a sailor cannot be expected to hunt out each man's stability.

APPENDIX B.

CONSOLADO DEL MARE.

It may be convenient in this place, before passing from classical to modern times, to give some brief account of a remarkable treatise, written in the Romance dialect, and occupying a sort of intermediate place,—the Consolado or Consulate of the Sea. There is great uncertainty as to the date, or even country, of the treatise, but it may be reasonably conjectured to be of Spanish origin, and certainly not later than the end of the 13th century. Its title would seem to imply that it was written for the guidance of the Consuls, who, from very early times, exercised maritime jurisdiction throughout Europe. Its provisions undoubtedly became the basis of the laws actually in force throughout Europe (a). The first forty-two chapters refer to the election of the judges of the Consular Court of Valencia, and the procedure before them. To these judges a special jurisdiction for maritime commerce was granted, in 1283, by King Pedro III., for the city of Valencia. Later on, in No. 43, is found a statute made for the Island of Majorca, by James I. of Spain, who died in 1275. After these, and some tabular matter, follows the Consolado proper, the first chapter of which is numbered 46. M. Pardessus found the missing chapter in a manuscript copy in the Royal Library in Paris. This, however, leaves it open to conjecture that the veritable Consolado may have been a separate and possibly much older work, written by a private person, and adopted—very much as the laws of Oleron were written into our Black Book of the Admiralty—for the guidance of the judges of this newly-constituted Spanish Court. This is confirmed by the character of the contents. This number 46 begins as follows:—*Aci comencen les bones costumes de la mar*: “Thus begin the good customs of the sea.” It continues: “Here are the good establishments and the good customs which have to do with the sea, which learned men who have gone through the world began to give to our ancestors: which they did by books of knowledge of the good customs. In the which we can find, what the master of the ship should do to the merchant, and to the mariner, and

(a) 2 Pard. 1--2.

to the pilgrims or to any other man who shall go in the ship; and also what the merchant should do to the master of the ship, and the mariner to the master of the ship or boat, and the pilgrims likewise. For pilgrim (*pelegrí*) is called, every man who ought to pay freight for his person and not for goods" (*b*).

Then follows a detailed and very curious set of directions for one who intended to build a ship, detailing the steps to be taken from the very beginning. It is in many respects remarkably similar to the most modern system of proceeding in setting on foot a single-ship company for a valuable iron or steel steamship, to be held in shares, with preference or debenture stock. This part of the subject is touched upon in Chap. VII.

The projector, after drawing out his scheme determining the length, breadth, and tonnage of his intended ship, how much he will take himself, and into how many shares he will divide her, is to bring her out among his friends, or, as we should say, put her on the market. When this is happily arranged, and the ship built and laden with merchandise, there go on board the projector, builder, managing owner, and usually shipmaster, all in one; the part-owners (*personers*), and, apparently as a matter of course, the *prestadors*, creditors, or those who have supplied what was wanting of capital for the building or outfit; and with them the owners of the cargo and the pilgrims or passengers. The ship was not trusted alone by anybody concerned. Then follows an account of the voyage, and the things to be done, whether the voyage is prosperous or adverse. Under the latter head follows a good deal concerning general average; but not a word about insurance, this latter contract not having at that time been invented.

From this sketch of the contents of the Consolado, it is easy to understand the conclusion of M. Pardessus, that the Consolado was not a law or body of laws authoritatively laid down, but a mere treatise, compiled, no doubt, with great learning and good sense, but not always quite sharply distinguishing established customs from what the author has adopted for himself as right according to the nature of things (*c*).

(*b*) 2 Pard. 49.

(*c*) "The Consolado," says Pardessus, "more extended than the compilation of Oleron, offering to the navigators of the Mediterranean a *résumé* of the laws which each of them practised in his own country, more complete than any of these laws, since it borrowed from each what was wanting in the others, and constituted them a whole, must have been appreciated, sought after, and by the sole authority of good sense and wisdom, have served as a guide in the commercial tribunals. This it is which explains the eagerness with which editions of it were multiplied after the invention of printing." (2 Pard. 20.)

APPENDIX C.

THE LAW OF THE ARGENTINE REPUBLIC.

THE Code of the Argentine Republic is modelled on that of Spain. The existing Code, from which the following extracts are taken, was sanctioned in 1889, and came into force in 1890. So far as general average is concerned, it reproduces almost without alteration the provisions of the Code of Buenos Ayres, which was sanctioned by the provincial Legislature in 1857, and became the law of the Republic in 1862.

TIT. XIV.

DE LAS AVERÍAS.

CAP. 1.

De la naturaleza y clasificacion de las averías.

Art. 1312. Se consideran averías todos los gastos extraordinarios que se hacen en favor del buque ó del cargamento ó de ambas cosas juntamente; y todos los daños que sobrevienen al buque ó á la carga, con ocasion del viaje ó durante él, hasta la llegada y descarga.

Art. 1313. En defecto de convenciones especiales espresas en las pólizas de fletamento ó en los conocimientos, las averías se pagan conforme á las disposiciones de este Codigo.

Art. 1314. Las averías son de dos clases:—gruesas ó comunes, y simples ó particulares.

TITLE XIV.

OF AVERAGE.

CAP. 1.

Of the nature and classification of Averages.

Art. 1312. All the extraordinary expenses incurred for the benefit of the ship or cargo or of both conjointly, and all the damages suffered by ship or cargo by reason of, or during, the voyage, until the arrival and discharge, are considered averages.

Art. 1313. Failing special agreements in the charter-parties, or in the bills of lading, averages are to be paid according to this Code.

Art. 1314. Averages are of two classes:—General or common; and simple or particular.

El importe de las averías comunes se reparte proporcionalmente entre el buque, su flete y la carga. El de las particulares se soporta por el dueño de la cosa que ocasionó el gasto ó recibió el daño.

Art. 1315. No se reputan averías sinó simples gastos, á cargo del buque:—

1°. Los pilotajes de costas y puertos;

2°. Los gastos de lanchas y remolques, si por falta de agua no puede el buque emprender el viaje del lugar de la partida con la carga entera, ni llegar al destino, sin alijar el buque;

3°. Los derechos de anclaje, visita y demás llamadas de puerto;

4°. Los fletes de lanchas hasta poner los efectos en el muelle, si no se hubiese pactado otra cosa, segun el conocimiento ó la póliza de fletamento;

5°. En general, cualquier otro gasto comun á la navegacion que no sea esotraordinario y eventual.

Art. 1316. Averías gruesas ó comunes son en general todos los daños causados deliberadamente en caso de peligro, y los sufridos como consecuencia inmediata de esos sucesos, así como los gastos hechos en iguales circunstancias, despues

The amount of the general average is divided proportionately between ship, freight, and cargo (Art. 1338). The amount of particular average is borne by the owner of whatsoever has occasioned the expense or received the damage.

Art. 1315. The following are deemed not to be averages, but ordinary expenses to be borne by the ship:—

1. Coast and harbour pilotage.

2. Costs of lighterage and towage, if from want of water the ship cannot start from the place of departure with all her cargo in, or arrive at her destination without lightening the ship (Art. 1320).

3. Dues for anchorage, visas, and other such port charges.

4. Hire of lighters to take the goods to the wharf, unless otherwise agreed in the bill of lading or charter-party.

5. In general, any other expense incident to the voyage, which is not extraordinary or accidental (Art. 1313).

Art. 1316. Gross or general average commonly consists of all the damages deliberately incurred in case of danger, and those suffered as the immediate consequence of these measures, and also expenses incurred in such circum-

de deliberaciones motivadas, para la salvacion comun de las personas ó del buque y cargamento conjunta ó separadamente, desde su carga y partida hasta su vuelta y descarga.

Salva la aplicacion de esta regla general en los casos que ocurran, se declara especialmente avería comun:—

1°. Todo lo que se dá á enemigos, corsarios ó piratas por vía de composicion para rescatar el buque y su cargamento, junta ó separadamente:

2°. Las cosas que se arrojan al mar para alijar el buque, ya pertenezcan al cargamento, al buque ó á la tripulacion;

3°. Los mástiles, cables, velas y otras aparejos que de propósito se rompan é inutilicen, ó se corten ó partan forzando vela para la salvacion del buque y carga;

4°. Las anclas, amarras y demás cosas que se abandonan para salvacion ó ventaja comun;

5°. El daño que de la echazon resulte á los efectos que se conserven en el buque;

6°. El daño que se cause al buque ó á algunos efectos del cargamento, por haber hecho de propósito alguna abertura en el buque para desaguarlo, ó para extraer y salvar los efectos del cargamento;

stances, after due deliberation, for the common safety of lives, or of ship and cargo conjointly or separately, from the time of the loading and departure until the arrival and discharge.

Without prejudice to the application of this general rule to cases that may occur, the following are specially declared to be general average:—

1. Everything given to enemies, corsairs, or pirates, by way of composition, to ransom ship and cargo, conjointly or separately.

2. Everything thrown overboard to lighten the ship, whether belonging to the cargo, ship, or crew (*a*).

3. Masts, cables, and other apparel purposely broken and made useless, or cut away or sprung while crowding sail for the safety of ship and cargo.

4. Anchors, cables, and other things abandoned for the common safety or advantage.

5. Any damage caused by the jettison to the goods on board.

6. Any damage caused to the ship or any part of the cargo by voluntarily making some opening in the ship, to clear her of water, or to get out and save goods of the cargo.

(*a*) For deck-loads, compare § 1344.

7°. La curacion, manutencion é indemnizaciones de los individuos de la tripulacion heridos ó mutilados en defensa del buque;

8°. La indemnizacion ó rescate de los individuos de la tripulacion aprisionados ó detenidos durante el servicio que prestaban al buque ó á la carga;

9°. Los sueldos y manutencion de la tripulacion durante la arribada forzada;

10°. Los derechos de pilotaje y otros de entrada y salida en un puerto de arribada forzada;

11°. Los alquileres de almacenes en que se depositen, en puerto de arribada forzada, los efectos que no pudieren continuar á bordo durante la reparacion del buque;

12°. Los gastos de reclamacion de buque y carga hechos conjuntamente por el capitán;

13°. Los sueldos y manutencion de los individuos de la tripulacion durante esa reclamacion, siempre que el buque y carga sean restituidos;

14°. Los gastos de alijo ó trasbordo de una parte del cargamento para aligerar el buque y ponerlo en estado de tomar puerto ó rada, con el fin de salvarlo de riesgo de mar ó de enemigos;

15°. Los daños que acaecieren á

7. Medical attendance, maintenance and indemnification of any of the crew hurt or maimed in defence of the ship.

8. The indemnification or ransom of any of the crew taken prisoners or detained whilst rendering service to ship or cargo.

9. Wages and maintenance of crew in a port of refuge.

10. Pilotage, and other expenses of entering and leaving a port of refuge.

11. The hire of warehouses in a port of refuge to store such goods in as cannot remain on board during the repairs of the ship.

12. The costs of reclamation of ship and cargo made conjointly by the captain.

13. Wages and board of crew during the reclamation, provided that the ship and cargo are restored.

14. The costs of lighterage or transshipment of any part of the cargo to lighten the vessel so as to enable her to enter some harbour or roadstead, with a view of saving her from a peril of sea or from enemies.

15. Any damage which the

los efectos por la descarga y recarga del buque en peligro;

16°. Los daños que sufiere el casco y quilla del buque que de propósito se hace varar, para impedir su pérdida total ó su apresamiento;

17°. Los gastos que se hagan para poner á flote el buque encallado, y la recompensa por servicios extraordinarios hechos para impedir su pérdida total ó apresamiento;

18°. Las pérdidas ó daños sobrevenidos á los efectos que, en consecuencia del peligro, se han cargado en lanchas ó buques menores;

19°. Los sueldos y manutencion de la tripulacion, si el buque despues de empezado el viaje, es obligado á suspenderlo por orden de potencia extranjera ó por superveniencia de guerra, en tanto que el buque y el cargamento no sean exonerados de sus obligaciones recíprocas;

20°. El premio del préstamo á la gruesa, tomado para cubrir los gastos que se consideran avería comun, y el premio del seguro de esos gastos;

21°. El menoscabo que resultare en el valor de los efectos que haya sido necesario vender en el puerto de arribada forzosa para hacer frente á aquellos gastos;

22°. Las costas judiciales para

goods sustain from the discharge or reloading of a ship in danger.

16. Any damage that the hull or keel of a vessel may suffer from being purposely run aground to escape total loss or capture.

17. Expenses incurred in floating a stranded vessel, and the reward for extraordinary services rendered to prevent her total loss or capture.

18. Any loss or damage happening to the goods which, on account of danger, have been loaded on lighters or small boats.

19. Wages and board of the crew, if after the voyage is begun, the ship is obliged to suspend it by order of a foreign power, or from war being declared, whilst the ship and cargo are not exonerated from their reciprocal obligations.

20. The premium of a bottomry bond taken to cover expenses which are counted general average, and the insurance premium on these expenses.

21. The deterioration in the value of the goods necessarily sold at the port of refuge to pay these expenses.

22. Judicial costs for the ad-

la clasificacion y distribucion de la avería comun;

23°. Los gastos de una cuarentena extraordinaria, imprevista al tiempo de la celebracion del fletamento, incluso los sueldos y manutencion de los individuos de la tripulacion.

Art. 1317. Si para cortar un incendio en algun puerto ó rada, se mandase echar á pique algun buque, como medida necesaria para salvar los demás, se considerará esa pérdida como avería comun, á cuyo pago contribuirán los demás buques salvados.

Art. 1318. Los gastos causados por vicios internos del buque, por su innavegabilidad, ó por falta ó negligencia del capitán ó individuos de la tripulacion, no se reputan avería gruesa, aunque hayan sido hechos voluntariamente, y en virtud de deliberaciones motivadas para beneficio del buque y cargamento.

Todos esos gastos son de cargo esclusivo del capitán ó del buque.

Art. 1319. Avería particular es, en general, todo gasto ó daño que no ha sido hecho para utilidad comun, y que se sufre por el buque ó la carga, mientras duran los riesgos.

Se considera especialmente avería particular:

1°. Los daños que sobrevienen al cargamento ó al buque por vicio

justment and distribution of general average.

23. The costs of an extraordinary quarantine, unforeseen at the time when the charter-party was signed, including board and wages of the crew.

Art. 1317. If, to stop a fire in some port or roadstead, a ship is ordered to be scuttled as a necessary step to save the rest; this loss is accounted general average, to the payment of which the other vessels saved must contribute.

Art. 1318. Expenses occasioned by inherent defects of the ship, by her unseaworthiness, or by some fault or negligence of the captain or of any of the crew, are not counted as general average, even though voluntarily incurred after due council held, for the good of ship and cargo.

All these expenses are to be borne exclusively by the captain or ship.

Art. 1319. Particular average is, in general, any expense or damage that has not been incurred for the common good, and that is suffered by ship and cargo during the continuance of the risks.

The following in particular are accounted particular average:—

1. Damage to cargo or ship caused by inherent vice, accidents

propio de las cosas, por accidente de mar, fuerza mayor, ó caso fortuito;

2°. Los gastos hechos para evitar ó reparar los daños á que se refiere el número precedente:

3°. Los gastos de reclamacion, sueldos y manutencion de los individuos de la tripulacion mientras aquella se sigue, cuando el buque y el cargamento son reclamados separadamente:

4°. La reparacion particular de los envases y gastos hechos para conservar los efectos averiados, á no ser que el daño resulte inmediatamente de hecho que dé lugar á avería comun;

5°. El aumento de flete y los gastos de carga y descarga que se causan en el caso que el buque haya sido declarado innavegable durante el viaje, si los efectos son trasportados por otro buque, segun lo dispues-o por el articulo 1075:

6°. Cualquier daño que resulte al cargamento, por descuido, falta ó baratería del capitan ó de la tripulacion, sin perjuicio del derecho del propietario, contra el capitan, buque y fletes.

Art. 1320. Los daños que sufren los efectos embarcados en lanchas para alijar al buque en caso de peligro, son juzgados conforme á las disposiciones establecidas en este capitulo, segun las diversas causas de que el daño resulte.

of the sea, *vis major*, or accidental circumstances.

2. Expenses incurred to avoid or repair any damage specified in the preceding paragraph.

3. The costs of reclamacion, and the wages and maintenance of crew, while this is being done, when the ship and cargo are reclaimed separately.

4. The particular repairs of the substances in which goods are packed, and expenses incurred to preserve damaged goods, unless the damage is the immediate result of a general average act.

5. The increase of freight, and the expenses of loading and discharge which may be caused in the case of the ship being declared unseaworthy during the voyage, if the goods are carried on by another vessel, according to the rule of Art. 1075.

6. Any damage to the cargo resulting from the negligence, fault, or barratry of the captain or crew, without prejudice to the rights of the cargo-owner against the captain, ship, and freights.

Art. 1320. Damage suffered by goods shipped on lighters to lighten the ship in case of danger (Art. 1315, No. 2), is judged by the rules laid down in this chapter, according to the different causes from which the injury proceeds.

Art. 1321. Si durante la travesía aconteciere á las lanchas ó á los efectos en ellas cargados, un daño que se repute avería comun, será soportado un tercio por las lanchas y dos tercios por los efectos que se encuentren á su bordo.

Esos dos tercios se reparten en seguida, como avería comun, sobre el buque principal, el importe del flete, y el cargamento entero, incluso el de las lanchas.

Art. 1322. Recíprocamente, y hasta el momento en que los efectos cargados en las lanchas sean desembarcados en el lugar de su destino y entregados á sus consignatarios, siguen en comunión con el buque principal y resto del cargamento, y contribuyen á las averías comunes que hubieran sobrevenido.

Art. 1323. Los efectos que no se encuentran á bordo, sea del buque principal, sea de las embarcaciones menores, destinadas á trasportarlos, no contribuyen á los daños que sucedieren en ese tiempo al buque para cuya carga son destinados.

Art. 1324. Para que el daño sufrido por el buque ó cargamento pueda considerarse avería á cargo del asegurador, es necesario que sea examinado por dos peritos arbitradores que declaren:

1º. La causa de que ha provenido el daño;

Art. 1321. If, during their passage, there should happen to the lighters, or the goods on board them, any damage which is reckoned general average, a third shall be borne by the lighters, and two-thirds by the goods on board them. These two-thirds are to be divided afterwards as general average between the ship, the amount of freight, and the entire cargo, including that of the lighters. (Art. 1338.)

Art. 1322. Reciprocally, and up to the moment when the goods shipped on the lighters are unloaded at the place of destination, and delivered to their consignees, they remain in a common adventure with the ship and the rest of the cargo, and contribute to any general average that may arise.

Art. 1323. Goods that are not on board either the ship or the boats intended to transport them to it, do not contribute to any damage that may occur at that time to the ship for whose cargo they are intended.

Art. 1324. In order that damage sustained by the ship or cargo shall be considered average for which the underwriter is liable, it is requisite that it should be surveyed by two expert arbitrators who shall declare:

1. The cause of the damage.

2°. La parte del cargamento que se halle averiada, indicando las marcas, números ó bultos;

3°. Cuanto valen los objetos averiados, y cuanto podrá importar su reparacion, ó reposicion, si se tratare del buque ó de sus pertenencias.

Todas estas diligencias, exámenes y reconocimientos serán determinados por el tribunal de comercio del respectivo distrito, y practicados con citacion de los interesados, por si ó por sus representantes. En caso de ausencia de las partes y falta de apoderado, puede el Juez nombrar de oficio persona inteligente é idónea que las represente.

Art. 1325. En el arreglo de la avería particular que debe el asegurador pagar, en caso de seguro contra todo riesgo, se observarán las disposiciones siguientes:

Todo lo que fuere saqueado, perdido ó vendido por averiado durante el viaje, se estima segun el valor de la factura, y en defecto de esta, segun el valor por el cual se haya celebrado el seguro, conforme á la ley, y el asegurador paga el importe;

En caso de llegada á buen puerto, si los efectos se encuentran averiados en todo ó en parte, se determinará por peritos arbitradores cual habria sido su valor si hubiesen llegado sin avería, y cual su valor actual; y el asegurador pagará una cuota del valor del seguro, en proporcion de la difer-

2. What portion of the cargo is injured; specifying marks, numbers or bulks.

3. The value of the damaged articles, and the cost of repairing or replacing them, if they belong to the ship or its appurtenances.

All these measures, examinations and investigations shall be directed by the tribunal of commerce of the district, and carried out after citation of the parties interested either personally or by their representatives. In case the parties are absent and unrepresented, the judge may *ex officio* appoint an intelligent and suitable person to represent them.

Art. 1325. In the adjustment of particular average, which an insurer against all risks must pay, the following rules shall be observed:—

Everything that has been pilaged, lost, or sold on account of damage during the voyage, shall be valued according to the invoice value, and, in default of such, according to the value for which it was insured according to law, and the insurer shall pay the value.

In case of arrival at a safe port, if either all or part of the goods are damaged, expert arbitrators shall determine what their value would have been if they had arrived without damage, and what is their actual value; and the insurer shall pay a part of the amount insured, in proportion to

encia que exista entre esos dos valores, comprendiéndose los gastos del reconocimiento y arbitraje.

Todo este independientemente de la estimacion de la ganancia esperada, si esta se hubiese asegurado.

Art. 1326. Los efectos averiados serán siempre vendidos en publico remate, á dinero de contado, á la mejor postura; pero si el dueño ó consignatorio no quisiere vender la parte de efectos sanos, en ningun caso puede ser compelado. El precio para el cálculo será el corriente que los mismos efectos, si fuesen vendidos al tiempo de la entrega, podrian obtener en la plaza, comprobado por los precios corrientes del lugar, ó en su defecto certificado, bajo juramento, per dos comerciantes de efectos del mismo género, designados por el tribunal.

Art. 1327. Si los efectos asegurados llegasen á la República averiados ó disminuidos, y la avería fuese esteriormente visible, el examen y estimacion del daño debe hacerse por peritos arbitradores, ántes que los efectos se entreguen al asegurado.

Si la avería no es esteriormente visible al tiempo de la descarga, puede hacerse el exámen despues de la entrega de los efectos al asegurado, con tal que se verifique en los tres dias inmediatos siguientes á la descarga, y sin perjuicio de las demás pruebas

the difference between the two values, taking into consideration the costs of the examination and arbitration.

This is altogether independent of the valuation of the expected profits, if the latter have been insured.

Art. 1326. The damaged goods shall always be sold by public auction, for cash, to the highest bidder; but if the owner or consignee does not wish to sell the sound part of the goods, he can in no case be compelled to do so. The price on which the calculation is made shall be the current price which the same goods would have realized, if they had been sold at the time of their delivery, as proved by the price lists of the place, or in default thereof by a certificate given on oath by two dealers in goods of the same kind nominated by the Court.

Art. 1327. If the insured goods arrive in the Republic damaged or diminished, and the damage is visible externally, the examination and assessment of the damage must be made by two expert arbitrators, before the goods are delivered to the assured.

If the damage is not visible externally at the time of the discharge, the examination may be made after delivery of the goods to the assured, provided that it takes place within the three days immediately following the discharge, without prejudice to other

que puedan producir los interesados.

Art. 1329. Sucediendo un daño por riesgo de mar á un buque asegurado, solo paga el asegurador los dos tercios de los gastos de reparacion, ya sea que esta si verifique ó no, en proporcion de la parte asegurada con la que no lo esté. El otro tercio correrá por cuenta del asegurado, en razon del mayor valor que se presume al buque.

Art. 1331. Si se justifica que las reparaciones han aumentado el valor del buque en más de un tercio, el asegurador pagará todos los gastos, conforme á las disposiciones del artículo 1329, deduciéndose el mayor valor que haya adquirido el buque con la reparacion.

Si el asegurado prueba por el contrario, que las reparaciones no han aumentado el valor del buque, por que era nuevo, y que el daño le ha sobrevenido en el primer viaje, ó por que las velas ó aparejos, &c. eran nuevos, no se deducirá el tercio, y el asegurador pagará todos los gastos de reparacion en la proporcion espresada en el artículo 1329.

CAP. 2.

Del proratea y de la contribucion en la avería comun.

Art. 1335. El arreglo y proratea de la avería comun deberá hacerse en el puerto de la entrega de la

proof that the parties interested can give.

Art. 1329. If an insured vessel suffers damage by a sea peril, the insurers pay two-thirds of the cost of the repairs, whether they are effected or not, in the proportion of the insured to the uninsured part. The other third shall be borne by the assured on account of the increase in the value of the ship which the repairs are presumed to have caused.

Art. 1331. If it be proved that the repairs have increased the value of the ship by more than a third, the insurer shall pay all the expenses in accordance with Art. 1329, after deducting the increased value which the vessel has gained by the repairs.

If, on the other hand, the assured proves that the repairs have not increased the value of the vessel, because it was new and the damage was sustained on her first voyage, or because the sails, apparel, &c. were new, the third is not deducted, and the insurer shall pay all the costs of the repairs, in the proportion mentioned in Art. 1329.

CAP. 2.

Of apportionment and contribution in general average.

Art. 1335. The adjustment and apportionment of general average must be made at the port where

carga ó donde acaba el viaje, no mediando estipulacion contraria.

Si el viaje se revoca en la República, si despues de la salida, se viese el buque obligado á volver al puerto de la carga, ó si encallare ó naufragare dentro de la República, la liquidacion de las averías se verificará en el puerto de donde el buque salió, ó debió salir.

Si el viaje se revocare, estando el buque fuera de la República, ó se vendiere la carga en un puerto de arribada forzosa, la avería se liquidará y prorateará en el lugar de la revocacion del viaje, ó de la venta del cargamento.

Art. 1336. El reconocimiento y liquidacion de la avería y su importe, se verificará por peritos arbitradores que á propuesta de los interesados ó sus representantes, ó bien de oficio si estos no lo hicieren nombrará el Tribunal de Comercio.

Si se hiciere en país extranjero, competará el nombramiento al Cónsul de la República, y en su defecto, á la autoridad que conozca de los negocios mercantiles.

Art. 1337. Si el capitán no verificase las diligencias ordenadas en el artículo precedente, pueden hacerlo los dueños del buque ó del cargamento ó cualquier otra persona interesada, sin perjuicio de la responsabilidad en que, por su omision, incurre el capitán.

the cargo is delivered, or wherever the voyage ends, if there is no stipulation to the contrary.

If the voyage is interrupted in the Republic, if after she has started, the ship is forced to put back to the port of embarkation, or if she gets aground or is wrecked within the Republic, the average statement must be drawn up in the port whence the ship sailed, or would have sailed.

If the voyage is interrupted when the ship is out of the Republic, or if the cargo is sold in a port of refuge, the average must be adjusted and apportioned in the place where the voyage was interrupted or the cargo sold.

Art. 1336. The verification and adjustment of the average and its amount should be made by two arbitrators, experts, whom at the request of the parties interested, or their agents, or failing these, *ex officio*, the Tribunal of Commerce shall appoint.

In a foreign country, the Consul of the Republic is competent to make the appointment, or failing him, the authority that takes cognizance of mercantile affairs.

Art. 1337. Should the captain not take the steps ordered in the preceding article, the owners of the ship or cargo, or any other party interested, may act without prejudice to the responsibility incurred by the captain by his omission.

Art. 1338. Las averías comunes serán prorateadas:

Sobre el valor del buque en el estado que se encuentre á su llegada, comprendiéndose lo que se dá por indemnizacion de la avería comun;

Sobre el importe del flete, deduciéndose los sueldos y manutencion de los individuos de la tripulacion;

Sobre el valor de los efectos que se hallaban al tiempo del suceso á bordo del buque ó de las lanchas ó embarcaciones menores, ó que antes de sucedido el daño fueron alijados por necesidad y reembolsados, ó que han tenido que venderse para pagar los gastos de avería.

La moneda metálica contribuye á la avería comun, segun el cambio del lugar donde acaba el viaje.

Art. 1339. Los efectos de la carga entran por su valor en el lugar de la descarga, deducido el flete, derechos de importacion y otros gastos de la descarga, asi como la avería particular que hubiesen sufrido durante el viaje. Exceptuánse los casos siguientes:

Si el prorateo tiene que hacerse en el puerto de donde el buque salió ó debia salir, el valor de los objetos cargados se determinará segun el precio de compra, con los gastos hasta á bordo sin que se comprenda el premio de seguro:

Art. 1338. General average is to be apportioned:

On the value of the ship in the state that she is in on her arrival, including what she receives as compensation in general average.

On the amount of the freight, deducting wages and maintenance of crew.

On the value of the goods on board at the time of the accident, or in the lighters or small boats (Art. 1320 *et seq.*), or which, before the accident occurred, were lightened of necessity and were contributed for, or which had been sold to pay the expenses of the average (a).

Coined money contributes to general average at the rate of exchange of the place where the voyage ends.

Art. 1339. The goods forming the cargo shall be estimated at their value at the place of discharge, minus the freight, import dues, and other costs of discharge, and also what particular average they may have suffered in the course of the voyage. The following cases excepted:—

If the apportionment has to be drawn up at the port whence the ship sailed, or was intending to sail (Art. 1335), the value of the goods shipped must be taken at the cost price, with the expenses up to the time they were put on board, not including the premium of insurance.

(a) As to the freight of such goods, see Art. 1086, *infra*.

Si esos objetos estuviesen averiados, segun su valor real;

Si el viaje se revocare, ó los efectos se vendiesen fuera de la República, y no se liquidase allí la avería conforme á lo dispuesto en el artículo 1335, se tomará como capital contribuyente el valor de esos efectos en el lugar de la revocacion del viaje, ó el producto liquido obtenido en el lugar de la venta.

Art. 1340. Los efectos alijados serán tasados segun el precio corriente del lugar de la descarga del buque, deducido el flete, derechos de importacion y gastos ordinarios. Su naturaleza y calidad se justificarán por los conocimientos, facturas y otros medios legítimos de prueba.

Art. 1341. Si la naturaleza ó la calidad de los efectos es superior á la designada en los conocimientos, contribuyen bajo el pié de su valor real en caso de salvarse.

Son pagados segun el valor señalado en la póliza de seguro, y en su defecto, con arreglo á la calidad designada en el conocimiento, si se han perdido por echazon.

Si los efectos declarados son de naturaleza ó calidad inferior á la indicada en el conocimiento, contribuyen en caso de salvarse, segun la calidad indicato por el conocimiento.

If the goods have been damaged, according to their actual value.

If the voyage be interrupted and the goods sold out of the Republic, and the average not settled there, agreeably to the rule of Art. 1335, the contributory value of the goods is their value at the place where the voyage was interrupted, or the net proceeds obtained at the place of the sale thereof.

Art. 1340. Goods thrown overboard shall be valued at the prices current at the place of the discharge of the ship, minus freight, import dues, and customary expenses (*b*). Their kind and quality to be proved by the bills of lading, invoices, and other legitimate means.

Art. 1341. If the kind and quality of the goods be superior to that designated in the bills of lading, they should contribute on the basis of their actual value, supposing they are saved.

If lost in the jettison, they are to be paid for according to the value inserted in the policy of insurance, or failing such, according to their quality as per bill of lading.

If the goods mentioned are inferior in kind and quality to their description in the bill of lading, they shall contribute in case of salvage according to the quality stated in the bill of lading.

(*b*) As to the freight of jettisoned goods, see Art. 1086, *infra*.

Mediando echazon, son pagados en la forma antes señalada.

Art. 1342. Las municiones de guerra y de boca del buque, el equipaje del capitán, individuos de la tripulación y pasajeros, no contribuyen en caso de echazon ú otra avería comun.

Sin embargo, el valor de los efectos de esa clase que se hubiesen alijado, será pagado á prorata por todos los demás objetos.

Art. 1343. Los efectos de que no hubiere conocimientos firmados por el capitán ó que no se hallen en la lista ó manifiesto de la carga, no se pagan si son alijados; pero contribuyen al pago de la avería comun si se salvaren.

Art. 1344. Los objetos cargados sobre cubierta contribuyen al pago de la avería comun en caso de salvarse. Si fuesen alijados ó se averiasen con motivo de la echazon, no tiene derecho el dueño, fuera del caso del segundo párrafo del artículo 911, á exigir su pago, sin perjuicio de la acción que le corresponde contra el capitán en el caso del artículo 910.

Art. 1345. Si el buque se pierde, no obstante la echazon, ó cualquier otro daño hecho voluntariamente para salvarle, cesa la obligación de contribuir al importe de la avería

In case of jettison, they are paid for in the manner stated above.

Art. 1342. Ammunition of war, provisions, and personal effects of captain, crew, and passengers, do not contribute in case of jettison or other general average.

Nevertheless, the value of goods of this kind, if they have been jettisoned, shall be paid for in proportion by all the rest (Art. 1338).

Art. 1343. Any goods for which there are no bills of lading signed by the captain, or which are not found in the list or manifest of the cargo, are not paid for if they are jettisoned; but if saved they contribute to the payment of general average.

Art. 1344. Deck cargo contributes to the payment of general average in case it is saved. If jettisoned or damaged with a view to jettison the owner has no right (except in case of the second paragraph of Art. 911 (c)), to claim payment for them, without prejudice to any corresponding action against the captain in case of Art. 910.

Art. 1345. Should the ship be lost, notwithstanding the jettison, or any other damage voluntarily incurred to save her, the obligation to contribute to general average

(c) Excepting in the small coasting trade, or river navigation, and where the custom is to carry deck loads. (Art. 911.)

comun. Los objetos que quedaren en buen estado ó se salváren, no responden á pago alguno por los alijados, averiados ó cortados.

Art. 1346. Si por la echazon de efectos ú otro daño cualquiera hecho deliberadamente para impedir el desastre, se salva el buque, y continuando el viaje se pierde, los efectos salvados del segundo peligro, contribuyen solo por sí á la echazon verificada con motivo del primero, bajo el pié del valor que tienen en el estado en que se hallan, deducidos los gastos de salvamento.

Art. 1347. Salvándose el buque ó la carga, mediante un acto deliberado de que resultó avería comun, no puede quien sufrió el perjuicio causado por ese acto, exigir indemnizacion alguna, por contribucion de los objetos salvados, si estos, por algun accidente no llegasen á poder del dueño ó consignatario, ó llegando no tuviesen valor alguno, salvos los casos de los articulos 949 y 1316 números 12, 13 y 21.

Sin embargo, si la pérdida de esos efectos procediese de culpa del dueño ó consignatario, quedarán obligados á la contribucion.

Art. 1348. El dueño de los efectos no puede en caso alguno ser obligado á contribuir á la avería comun con mas cantidad de

ceases. Any effects remaining in good condition, or saved, do not pay at all for what has been thrown over, damaged, or cut away.

Art. 1346. If by the jettison or any other damage whatever voluntarily incurred to avert the disaster, the ship is saved and, continuing the voyage, is lost, any effects saved from the second danger contribute only *per se* to the jettison effected with a view to the first danger, on the basis of their value in their actual condition, deducting costs of salvage.

Art. 1347. If ship or cargo be saved by a deliberate act resulting in general average, any one who has suffered loss from this act, cannot claim indemnification by contribution from the goods saved, if by some accident these never reach their owners or consignees, or reaching them, are found worthless, except in the cases specified in Arts. 949 (*d*), and 1316, Nos. 12, 13, and 21.

Nevertheless, if the loss of these goods was due to the fault of the owners or consignees, their obligation to contribute remains.

Art. 1348. The owner of the goods cannot in any case be obliged to contribute to general average a higher sum than what

(*d*) This article refers to loans on bottomry.

la que valgan los efectos al tiempo de su llegada, á no ser respecto de los gastos que el capitán, despues del naufragio, apresamiento ó detencion del buque, haya hecho de buena fé, y aun sin órdenes é instrucciones, para salvar los efectos naufragados, ó reclamar los apresados, aun en el caso de que sus diligencias ó reclamaciones fuesen infructuosas.

Art. 1349. Si despues de verificado el prorateo, recobran los dueños ó consignatarios los efectos alijados, están obligados á devolver al capitán é interesados en la carga la parte que recibieron en contemplacion de tales objetos, deduciendo los daños causados por la echazon y los gastos del recobro.

En tal caso, la suma devuelta será repartida entre el buque y los interesados en la carga, en la misma proporcion en que contribuyeron para el resarcimiento del daño causado por la echazon.

Art. 1350. Si el dueño de los objetos alijados los recobra sin reclamar indemnizacion alguna, ó sin haber figurado en la liquidacion de la avería, esos objetos no contribuyen á las averías que sobrevengan al resto de la carga, despues de la echazon.

the goods are worth at the time of their arrival, except for the expenses which the captain after shipwreck, capture, or detention of his vessel may have incurred in good faith, even if without orders and instructions, to save the wrecked goods or reclaim the captured ones, however much his efforts may have been in vain.

Art. 1349. If after the apportionment has been made, the owners or consignees of the effects jettisoned should recover them, they are bound to return to the captain, and the parties interested in the cargo, the amount which they had received on account of such goods, deducting expenses incurred for the recovery, and damages caused by the jettison.

In such a case, the sum returned shall be divided between the ship, and those interested in the cargo, in the same proportion as that in which they contributed to compensation for the damage caused by the jettison.

Art. 1350. If the owner of the goods jettisoned should recover them without having claimed any indemnification, or without having appeared in the average adjustment, these goods do not contribute to damage sustained by the rest of the cargo after the jettison.

FROM TIT. XII.

DE LAS ARIBADAS FORZOSAS.

Art. 1274. Cuando un buque entra por necesidad en algun puerto ó lugar distinto de los determinados en el viaje estipulado, se dice que hace arribada forzosa.

Son justas causas de arribada:

1°. La falta de víveres ó de aguada;

2°. Cualquiera accidente en la tripulacion, carga ó buque que inhabilite á este para continuar la navegacion;

3°. El temor fundado de enemigos ó piratas.

Art. 1275. Aun en los casos previstos en el artículo precedente, no se tendrá por legitima la arribada:

1°. Si la falta de víveres ó de aguada proviniese de no haberse hecho el aprovisionamiento necesario para el viaje, segun uso y costumbre de los navegantes, ó de haberse perdido ó corrompido por mala colocacion ó descuido, ó porque el capitan hubiese vendido alguna parte de los víveres ó aguada;

2°. Si la innavegabilidad del buque procediese de no haberlo reparado, pertrechado ó dispuesto competentemente para el viaje, ó del mal arrumaje de la carga;

FROM TIT. XII.

OF PUTTING INTO A PORT OF REFUGE.

Art. 1274. When a ship is forced to put into any port or place other than those agreed on for her voyage, it is said that she has put into a port of refuge (Art. 1092).

The following are lawful causes for putting in:

1. Want of victuals or water.

2. Any accident to crew, cargo, or ship, which may unfit her for continuing her voyage.

3. Reasonable fear of enemies or pirates.

Art. 1275. Even under the above circumstances, putting in will not be held justifiable:

1. If the want of victuals or water was caused by there not having been a proper supply for the voyage according to maritime use and custom; or because they had got lost or spoiled by bad stowage or carelessness, or because the captain had sold part of the victuals or water.

2. If the innavigability of the ship proceeded from her not having been repaired, provided or stored completely for the voyage, or from bad stowage of the cargo.

3°. Si el temor de enemigos ó piratas no hubiese sido fundado en hechos positivos que no dejen lugar á la duda.

Art. 1277. Los gastos de la arribada forzosa serán de cuenta del fletante, ó del fletador, ó de ambos, segun sean las causas que los han motivado, salvo su derecho á repetirlos contra quien hubiere lugar.

Art. 1279. Solo se procederá á la descarga en el puerto de arribada, cuando sea de indispensable necesidad hacerlo, para practicar las reparaciones que el buque necesite, ó para evitar daño ó avería en el cargamento.

En ambos casos debe preceder á la descarga la autorizacion del Tribunal ó de la autoridad que conozca de los negocios mercantiles. En puerto extranjero donde haya Consul del República, será de su cayo dar esa autorizacion.

From TIT. III.

DE LOS CAPITANES.

Art. 933. El capitan está obligado á pedir el dictámen de los dueños del buque, cargadores ó sus mandatorios, estando presentes, y en todos los casos á consultar á los oficiales del buque, siempre que se trate de algun acontecimiento importante.

Ninguna disculpa podrá exonerar de responsabilidad al capi-

3. If the fear of enemies or pirates was not founded on positive facts leaving no room for doubt.

Art. 1277. The expenses of putting into a port of refuge are for the account of the owner or the freighter of the ship, or both, according to the causes which have led to it, the right being reserved to claim them from whomsoever they legally may.

Art. 1279. Discharge in a port of refuge is only allowable when it is absolutely necessary, either for the repairs required by the ship, or to save the cargo from loss or damage.

In either case, the discharge should be preceded by the authorization of the Court or of the authority having cognizance of maritime affairs. In a foreign port where there is a Consul of the Republic, the authorization should be given by him.

From TIT. III.

OF CAPTAINS.

Art. 933. The captain is bound to take the opinion of the owners of the ship, of the shippers or of their representatives, when they are present, and in all cases to consult the officers of the ship whenever an important matter arises.

No excuse can exonerate the captain from responsibility for de-

tan que mudase la derrota que estaba obligado á seguir, ó que practicase algun otro acto extraordinario, de que pueda provenir daño á las personas ó al buque ó carga, sin haber precedido deliberacion tomada en junta, compuesta de todos los oficiales del buque, y en presencia de los interesados en el buque ó en la carga, si algunos se encontrasen á bordo.

En tales deliberaciones, y en todas las demás resoluciones que fuese obligado á tomar con acuerdo de los oficiales del buque, el capitán podrá, siempre que lo juzgare conveniente, obrar bajo su responsabilidad personal, contra el dictámen de la mayoría.

Art. 938. En caso de echazon, el capitán estará obligado á echar primero, siendo posible, la cosas menos necesarias, las mas pesadas y las de menor precio; en seguida las mercaderías del primar puente, á su eleccion, despues de haber oído el dictámen de los oficiales del buque.

El capitán debe asentar por escrito, tan luego como le sea posible, las resoluciones tomadas á tal respecto. El asiento contendrá:

1°. Las causas que hayan determinado la echazon;

2°. La enunciacion de los objetos echados ó averiados;

3°. Las firmas de los que hayan sido consultados, ó la espresion de

parting from the route which he was obliged to follow, or for taking any other extraordinary measure from which damage may ensue to persons, or to the ship or cargo, without previous deliberation at a council composed of all the officers of the ship, and in the presence of the persons interested in the ship or cargo, if any of them are on board.

In these deliberations, and in all other resolutions as to which he is bound to take the advice of the ship's officers, the captain may, whenever he thinks proper, act on his own responsibility against the advice of the majority.

Art. 938. In case of jettison the captain is bound to jettison first, if possible, the articles which are least necessary, the heaviest and those having the least value; next the goods on the upper deck according to his choice, after having taken the advice of the ship's officers.

The captain must put into writing, as soon as possible, the resolutions taken in this respect. The record must contain:—

1. The reasons for the jettison.

2. A list of the articles jettisoned or damaged.

3. The signatures of the persons who have been consulted, or a

los motivos que hayan tenido para no firmar.

Art. 947. Cuando durante el viaje el capitán se halle sin fondos pertenecientes al buque, ó sus propietarios, no hallándose presentes alguno de estos, sus mandatarios ó consignatarios, y en su defecto, algun interesado en la carga, ó si aunque se hallasen presentes, no le facilitasen los fondos necesarios, podrá contraer deudas, tomar dinero á la gruesa sobre el casco, quilla y aparejos, y hasta en falta absoluta de otro recurso, vender mercaderías de la carga, declarando en los documentos de las obligaciones que firmare, la causa de que proceden.

Las mercaderías que en tales casos se vendieren serán pagadas á los cargadores por el precio que las otras de igual calidad obtuvieren en el puerto de la descarga, en la época de la llegada del buque, ó por el que señalaren peritos arbitradores, en el caso que la venta hubiere comprendido todas las mercaderías de la misma calidad.

Si el precio corriente fuere inferior al de venta, el beneficio pertenecerá al dueño de las mercaderías. Si el buque no pudiere llegar al puerto de su destino, la cuenta se dará por el precio de venta.

Art. 948. Para que pueda tener lugar alguna de las medidas autorizadas en el artículo precedente, es indispensable:

statement of their reasons for refusing to sign.

Art. 947. If, in the course of the voyage, the captain finds himself without any money belonging to ship or her owners, and none of them or of their agents or consignees are on the spot, or failing these, none of those interested in the cargo, or being on the spot they do not advance the necessary funds, he has power to contract debts, to hypothecate hull, keel, and tackle, and, every other resource absolutely failing, he may even sell goods belonging to the cargo, stating, in the documents of the bonds which he signs, the causes which have led to them. (Art. 950.)

The goods sold in such a case shall be paid for to the shippers at the same price that others of the same quality are fetching at the port of discharge at the time of the ship's arrival; or at a valuation made by experts, supposing that the sale had comprised all the goods of that quality.

If the price current is less than the sale has fetched, the profit shall belong to the owner of the goods. If the ship cannot reach the port of destination, the account is made up at the price of the sale.

Art. 948. The following conditions are requisite, to justify any of the measures in the preceding article:—

1°. Que el capitán pruebe falta absoluta de fondos en su poder, pertenecientes al buque ó sus dueños;

2°. Que no se halle presente el dueño del buque, sus mandatarios ó consignatarios, y en su defecto, alguno de los interesados en la carga, ó que hallándose presentes, hayan sido requeridos sin resultado;

3°. Que la resolución haya sido tomada de acuerdo con los oficiales del buque, haciéndose en el diario de navegación el asiento respectivo.

La justificación de estos requisitos será hecha ante el Tribunal de Comercio del puerto donde se tomare el dinero á la gruesa, ó se vendieren las mercaderías, y en país extranjero ante los Cónsules de la República ó la autoridad local, en su defecto.

Art. 949. Las letras procedentes de dinero recibido por el capitán para gastos indispensables del buque ó de la carga, en los casos previstos en los artículos anteriores, y los premios del seguro respectivo, cuando su importe hubiera sido realmente asegurado, tienen el privilegio de letras de cambio marítimo, si contienen declaración expresa de que su importe fué destinado para los referidos gastos, y son exigibles, aunque tales objetos se pierdan por algún suceso posterior, probando el dador que el dinero fué

1. That the captain shall prove an absolute want of any funds at his command, belonging to the ship or her owners.

2. That neither the shipowner, his agents, nor consignees were at hand, nor failing them, any one interested in the cargo; or that, being on the spot, they were solicited for money in vain.

3. That the resolution shall have been come to in agreement with the ship's officers, their respective consent being entered in the log book.

The legalization of these requisite conditions is to be made before the Tribunal of Commerce in the port where the bottomry bond is obtained or the goods sold, and in foreign countries before the Consuls of the State, or failing such, the local authorities.

Art. 949. The bills of exchange for money received by the captain for the necessary expenses of the ship or cargo, in the cases specified in the preceding articles, and the respective premiums of insurance, if their amount has really been insured, have the privileges of maritime bills of exchange, if they contain an express declaration that their amount was intended to be used for the said expenses; and they are payable even if the property is lost by reason of a later occurrence, provided that the lender proves that

efectivamente empleado en beneficio del buque ó de la carga.

Art. 950. Las obligaciones que contrae el capitán para atender á la reparacion, habilitación y aprovisionamiento del buque, no le constituyen personalmente responsable, sinó que recaen sobre el armador, á no ser que el capitán comprometa espresamente su responsabilidad personal ó suscriba letras de cambio ó pagarés á su nombre.

Sin embargo, el capitán que en los documentos de las obligaciones procedentes de gastos que haya hecho para la habilitacion, reparacion ó aprovisionamiento del buque, omitiere enunciar la causa de que proceden, quedará personalmente obligado hácia las personas con quienes contratare, sin perjuicio de la accion que éstas puedan tener contra los dueños del buque, si probaren que las cantidades debidas fueron efectivamente aplicadas en beneficio de la embarcacion.

Art. 958. El capitán no puede retener á bordo los efectos de la carga para seguridad del flete; pero tiene derecho á exigir de los dueños ó consignatarios en el acto de la entrega de la carga, que depositen ó afiancen el importe del flete, averías gruesas y gastos á su cargo; y en falta de pronto pago, depósito ó fianza, podrá requerir embargo por los fletes, averías y gastos en los efectos del cargamento, mientras estos se hallaren

the money was in fact used for the benefit of the ship or cargo.

Art. 950. The obligations which the captain may contract in order to effect the repairs, fitting out, and victualling of the ship, do not make him personally responsible, but are binding on the shipowner, unless the captain expressly pledges his personal responsibility or signs bills of exchange or bonds with his own name.

Nevertheless, a captain who in cases of forced expenditure for the fitting, repairing, or victualling of his ship, omits to declare in the bonds the cause from which they proceed, remains personally pledged to the parties with whom he has dealt, without prejudice to any action these may take against the shipowners, if they can prove that the sums due were really applied for the good of the vessel.

Art. 958. The captain may not detain on board the goods of the cargo as security for freight; but he has a right to claim from the owners or consignees, at the time of delivering the cargo, a deposit or guaranty for the amount of the freight, general average, and expenses incurred, and in default of immediate payment, deposit, or guaranty, he can lay an embargo on the goods of the cargo for freight, averages, and expenses in-

en poder de los dueños ó consignatarios, ya estén en los almacenes públicos de depósito ó fuera de ellos, y hasta podrá requerir la venta inmediata, si los efectos fuesen fácilmente deteriorables ó de conservacion difícil ó dispendiosa.

La accion de embargo queda prescrita pasados treinta dias, contados desde el último dia de la descarga.

Art. 960. Cuando por ausencia del consignatario, por su negativa á recibir la carga, ó por no presentarse portador legítimo de los conocimientos á la orden, ignorare el capitán á quien haya de hacer legítimamente la entrega del cargamento, lo pondrá á disposicion del Tribunal de Comercio, ó en su defecto, de la autoridad judicial local, para que provea lo conveniente á su depósito, conservacion y seguridad.

Así en este caso como en el Art. 958, si la avería gruesa no pudiere ser arreglada inmediatamente, es lícito al capitán exigir el depósito judicial de la suma que se arbitrare.

Art. 961. El capitán que entregare la carga antes de recibir el flete, avería gruesa y gastos, sin poner en práctica los medios del artículo precedente, ó los que le dieran las leyes del lugar de la descarga, no tendrá accion para exigir el pago del fletador, si éste probare que no había cargado por cuenta propia, sino en calidad de

curred by the said goods, whilst these are in the hands of the owners or consignees, whether or not they be in public warehouses, and he may even demand an immediate sale, if the goods should be easily deteriorated, or difficult and costly to preserve.

The writ of embargo holds good thirty days, counting from the last day of the discharge.

Art. 960. When, from the absence of the consignee, or his refusal to receive the cargo, or from no properly authorized person appearing with bills of lading to order, the captain does not know to whom he ought to deliver the cargo, he must place it at the disposal of the Tribunal of Commerce, or failing that, of the local judicial authority, that it may provide for its due deposit, preservation, and security.

And in this case, as in Art. 958, if the general average cannot be adjusted at once, the captain may lawfully claim the judicial deposit of such sum as the Court shall think fit.

Art. 961. The captain who delivers the cargo before receiving the freight, general average, and charges, without taking the measures indicated in the preceding Article or allowed by the law of the place of discharge, cannot maintain an action for the payment thereof against the shipper, if the latter proves that he did not

comisionista ó por cuenta de tercero.

TIT. VII.

DE LOS FLETAMENTOS.

From CAP. 2.

De los derechos y obligaciones del fletante y fletador.

Art. 1051. Sufriendo el buque, que en el caso de los dos artículos anteriores ha salido sin carga, ó con sola parte de la carga, alguna avería durante el viaje que debiera considerarse como avería comun en el caso de tener integra la carga, tendrá derecho el fletante á exigir del fletador la contribucion por los dos tercios de lo nó cargado.

Art. 1053. En los casos en que el fletante tiene derecho á emprender viaje sin carga, ó con solo una parte de la carga, puede, para la seguridad del flete y de las otras indemnizaciones á que haya lugar, tomar carga de otros individuos, sin consentimiento del fletador, aunque sea por menor flete, siendo la difrencia de cuenta del fletador.

En tel caso, el fletador tiene

ship for his own account, but as a commission agent or for the account of a third party.

TIT. VII.

OF AFFREIGHTMENT.

From CAP. 2.

Of the Rights and Obligations of the Shipowner and Freightier (e).

Art. 1051. If the ship, having in the cases specified in the two preceding Articles (f), sailed without cargo or only with part of the cargo, has suffered damage which would be considered general average if she had a full cargo on board, the shipowner has the right to claim from the freightier contribution for two-thirds of the cargo which has not been shipped.

Art. 1053. In the cases in which the shipowner has the right to sail on the voyage without cargo, or with only a part cargo, he may, for the security of the freight and of such other indemnities as he can claim, accept cargo from other parties, without the consent of the freightier, even at a lower freight, the freightier being liable for the difference.

In such case the freightier is en-

(e) According to the definition in Art. 1018, the person who lets a ship for the carriage of merchandize is called the *fletante*, the person who hires it is called the *fletador*. Therefore, the term *fletante* has really a wider meaning than *shipowner*, and cannot be accurately expressed by any English word.

(f) When the lay days and demurrage days have expired and the freightier has failed to load any cargo or a full cargo. In such cases Arts. 1049 and 1050 give the shipowner the right either to complete the voyage and earn the full freight, or [discharging the cargo if any has been loaded] to rescind the contract and claim half the freight.

derecho al beneficio del nuevo flete, y en caso de avería comun, no responde por la contribucion que recaiga en los efectos que no le pertenecen: pero está obligado al pago de las indemnizaciones establecidas en los artículos precedentes.

Art. 1074. Si el capitan se viese obligado durante el viaje á hacer reparaciones urgentes en el buque, por casos de tempestad, fuerza mayor ó que no provengan de su culpa, el fletador ó cargador estará obligado á esperar hasta que se haya efectuado la reparacion, ó podrá retirar sus efectos, pagando el flete por entero, estadias y sobreestadias, avería comun, si la hubiere, y gastos de desestiva y restiva.

Art. 1075. Si el buque no admitiere reparacion, está obligado el capitan á fletar por su cuenta, y sin poder exigir aumento de flete, uno ó más buques para el transporte de la carga al lugar de su destino.

Si el capitan no pudiese fletar otros buques, se depositará la carga por cuenta de los fletadores en el puerto de la arribada, regulándose el flete del buque que quedó inservible, en razon de la distancia recorrida.

En este último caso, el transporte de las mercaderías corresponderá á los cargadores, salva la obligacion del capitan de notificarles la situacion en que se halla, debiendo tomar en el intervalo todas las

titled to the benefit of the new freight, and in the event of general average, he is not liable for the contribution of the goods that do not belong to him: but he is liable to pay the indemnities prescribed in the preceding Articles.

Art. 1074. If a captain finds himself obliged in the course of his voyage to have urgent repairs effected to his ship, either from storms, *vis major*, or any cause not his own fault, the freighter or shipper must wait until the repairs are done; or he may withdraw his goods, paying the freight in full, demurrage and extra demurrage, general average if there be any, and costs of unstowing and restowing.

Art. 1075. If the ship is past repairs, the captain is bound to hire one or more vessels at his own expense and without claiming any increase of freight, to convey the cargo to its port of destination.

If the captain cannot hire other vessels, he must warehouse the cargo at the port of refuge on behalf of the freighters, the freight of the disabled ship being regulated in proportion to the distance performed.

In the last mentioned case, the transportation of the goods concerns the freighters, subject to the obligation of the captain to notify the situation in which he is placed, he being bound during the interval

medidas necesarias para la conservacion de la carga.

Art. 1076. Si los cargadores justificaren que el buque que quedó inservible no estaba en estado de navegar cuando recibió la carga, no podrá exigírseles los fletes, y tendrán derecho á que el fletante les indemnice todos los daños y perjuicios.

Esta prueba será admisible á pesar del certificado de visita sobre la aptitud del buque para emprender el viaje.

Art. 1085. Pagan el flete integro segun lo pactado en la póliza de fletamento, los efectos que sufran deteriora ó disminucion por hecho de que non sea responsable el capitan.

Los efectos que por su naturaleza son susceptibles de aumento ó disminucion se aumentarán ó disminuirán para sus dueños. En uno y en otro caso, se paga el flete por lo que se cuente, mida ó pese en el acto de la descarga.

Art. 1086. Pagan flete por entero los efectos que el capitan se haya visto obligado á vender en los casos previstos en el artículo 947.

El flete de los efectos arrojados al mar para salvacion comun del buque ó carga, se paga por entero como avería gruesa.

Art. 1087. No se debe flete de los efectos que se hubiesen perdido por naufragio ó varamiento, ni de los que fueron presa de piratas ó enemigos, y si se hubiese pagado

to take all necessary measures for the preservation of the cargo.

Art. 1076. If the shippers can prove that the ship now disabled was not in a seaworthy state when she took in cargo, the freights cannot be claimed from them, and they are entitled to claim from the shipowner all costs and damages.

This proof shall be admissible, giving due weight to the certificate of survey as to the fitness of the ship to undertake the voyage.

Art. 1085. Goods which have suffered deterioration or diminution from causes for which the captain is not responsible, pay full freight according to the terms of the charter-party.

The increase or diminution of goods, which from their nature are liable to increase or diminish, is at the risk of their owners. In either case, freight is paid according to the number, measurement or weight at the time of discharge.

Art. 1086. Goods which the captain has been obliged to sell in the cases provided for in Art. 947 must pay freight in full.

The freight of goods jettisoned for the common safety of ship or (*sic*) cargo is paid in full as general average.

Art. 1087. No freight is due for goods which are lost by shipwreck or stranding; nor for those which have been seized by pirates or enemies; and if any has been ad-

adelantado, habrá lugar á repetirlo, no mediando estipulacion contraria.

Art. 1088. Rescatándose el buque y carga, declarándose mala presa, ó salvándose del naufragio, se debe el flete hasta el lugar de la presa ó del naufragio, proporcionalmente al flete estipulado, y si el capitán llevase los efectos hasta el puerto de su destino, se abonará el flete por entero, contribuyendo como avería gruesa al daño ó rescate.

Si los llevare á otro puerto que al de su destino, por no poder ir adelante, el flete se debe hasta el lugar de la arribada.

Art. 1089. Salvándose en el mar ó en las playas, sin cooperacion de la tripulacion, fuera del caso del artículo 1086, efectos que hicieron parte de la carga, y siendo entregados por personas extrañas, no se debe por ellos flete alguno.

Art. 1090. El cargador no puede hacer abandono de los efectos en pago de fletes, á no ser tratándose de líquidos, cuyas vasijas hayan perdido mas de la mitad de su contenido.

Art. 1091. El contrato de fletamento de un buque extranjero que haya de tener ejecucion en la República, debe ser juzgado por las reglas establecidas en este Código, ya haya sido estipulado dentro ó fuera de la República.

vanced, its return may be demanded, if there was no stipulation to the contrary.

Art. 1088. If ship and cargo are ransomed, or declared wrongly captured, or are saved from shipwreck, freight is due to the place of such capture or wreck, in proportion to the freight agreed, and if the captain brings the goods to the port of destination, the freight must be paid in full, contributing as general average to the damage or ransom.

If he takes them to some other port than the port of destination because he could go no further, freight is due to the place where he has arrived.

Art. 1089. If goods forming part of the cargo are saved either at sea or on the beach, without the crew's help, excepting in the case of Art. 1086, and are delivered by strangers, no freight at all is due for them.

Art. 1090. The shipper may not abandon his goods in payment of freight, excepting in the case of liquids, the vessels of which have lost more than half of their contents.

Art. 1091. The contract of affreightment of a foreign vessel which has to be fulfilled in the Republic, must be judged according to the rules of this Code, whether it has been effected in the Republic or not.

*From CAP. 3.**De la resolucion de los contratos de fletamento.*

Art. 1095. Cuando un buque ha sido fletado para varios destinos, y hallándose despues de acabado un viaje, en un puerto en que debia empezar otro, sobreviniese guerra, ántes de empezado el nuovo viaje, se observerán las siguientes disposiciones:

1^a. Si ni el buque ni la cargason libres, deberá el buque permanecer en el puerto hasta la paz, ó hasta que pueda salir en convoy ó de otro modo seguro, ó hasta que el capitán reciba nuevas instrucciones de los dueños del buque y de la carga. Hallándose cargado el buque, podrá el capitán depositar la carga en lugar seguro, hasta que pueda continuar viaje, ó se tomen otras medidas. Los salarios y manutencion de la tripulacion, alquileres de almacen y demás gastos ocasionados por la demora, así en este caso como en el de no hallarse cargado el buque, se repartirán como avería gruesa entre el fletante y fletador; si el buque no estuviese cargado todavía, los dos tercios de los gastos serán por cuenta del fletador:

2^a. Si solo el buque no es libre, se rescinde á instancia del fletante el contrato para el viaje que tenia que hacerse. Estando el buque cargado, el fletante ó capitán pagará los gastos de la carga y

*From CAP. 3.**Of the Performance of Contracts of Affreightment.*

Art. 1095. When a ship has been chartered for several destinations, and is at the conclusion of one voyage at a port where she ought to begin another, and war breaks out before she sails on the new voyage, the following provisions are to be applied:—

1. If neither the ship nor the cargo is free to leave, the ship must remain in the port until peace is concluded, or until she can sail under convoy or in some other safe manner, or until the captain receives new instructions from the owners of the ship and cargo. Should the ship be loaded, the captain may deposit the cargo in a safe place, until he can continue the voyage, or until other measures can be taken. The wages and maintenance of the crew, warehouse rent, and other expenses caused by the delay both in this case and when the ship has not been loaded, are divided as general average between the shipowner and the freighter. If the ship has not been loaded, two-thirds of the expenses shall be charged to the charterer.

2. If the ship only is not free to leave, the contract may be rescinded by the shipowner with regard to the voyage which was about to be commenced. Should the ship be loaded, the shipowner

descarga. En tal caso, solo podrá exigir el flete, en proporcion del viaje ya hecho, estadías y sobre-estadías y avería gruesa si la hubiere;

3^a. Si por el contrario, el buque es libre y la carga no lo es, el fletador tiene derecho para rescindir el contrato, pagando los gastos de carga y descarga y demás indicados en los dos artículos precedentes, y el capitán en su caso podrá proceder conforme á lo dispuesto en los artículos 1049 y 1053.

or captain must pay the expenses of loading and unloading. In such case, he is only entitled to freight in proportion to the voyage already accomplished, demurrage and extra demurrage, and general average if there has been any.

3. If, on the contrary, the ship is free and the cargo is not, the freighter is entitled to rescind the contract, paying the expenses of loading and discharging, and the other expenses specified in the two preceding articles (*g*), and the captain may proceed in accordance with the provisions of Arts. 1049 and 1053.

(*g*) *I.e.*, the expenses of equipping the ship, wages and maintenance of the crew until the rescission or unloading, and demurrage, &c. and general average incurred before the rescission.

APPENDIX D.



THE LAW OF AUSTRIA.

THE Editors have been informed by Mr. Fillipo Artelli, Average Adjuster, of Trieste, that the Austrian Law of General Average has undergone no change for many years, and is correctly described in Mr. Gourlie's learned work on General Average, for which he supplied information thirty years ago. It appears that in the absence of a commercial Code, the rules on which the average adjusters base their apportionments are mainly derived from the Code Napoleon. The following statement of the principal rules arranged in the order of this treatise is derived from Mr. Gourlie's book.

General Principles.

A general average act must be voluntary and deliberate, done to escape an imminent danger and preceded by a consultation between the master and crew. The consequences of a general average act are also general average, and this principle is even applied in some cases to losses which are only the accidental consequences of the general average act, *e.g.*, to the loss by fire, or robbery, of goods warehoused at a port of refuge while the ship is being repaired. So, also, if seamen desert at a port of refuge, the cost of replacing the deserters is allowed in general average, if the desertion was not the captain's fault, on the ground that they could not have escaped if the ship had not put into the port.

If a sacrifice be fruitless, nothing being saved thereby, there is no contribution; but if, subsequently to a sacrifice, the ship be lost, yet the cargo is finally saved, it contributes to the sacrifice.

Goods subsequently lost do not contribute to a general average expenditure.

There is no apportionment in general average in the case of a vessel in ballast, but the shipowner, if insured, can claim for the sacrifice against the underwriters on ship.

Sacrifices of Cargo.

The jettison of deck cargo is not general average, except on short coasting voyages, or when there is a special contract agreed to by all the shippers, which allows the cargo to be carried on deck.

Cargo jettisoned because, as a result of damage or of its inherent vice, it endangers the ship and the rest of the cargo, is contributed for in general average to the extent of the loss caused by the sacrifice.

Damage incidental to jettison, *e.g.*, to other goods by seas shipped while the hatches are open, or by the derangement of stowage after the jettison, is general average.

Damage to cargo by water used to extinguish a fire on board the ship is general average, even in the case of packages themselves on fire.

Cargo used as fuel in an emergency is contributed for in general average, provided that a supply of fuel amply sufficient for an ordinary voyage had been taken on board.

Money or goods given to captors by way of ransom for the ship and cargo are allowed in general average, and it is stated that even "where the captors seize such valuables and release the rest of the property, this loss is also compensated for, because, though not *given* but *taken away* by the captors, the general average condition remains." (Gourlie, p. 370.)

Loss of or damage to cargo discharged into lighters to refloat a stranded vessel, or unloaded at a port of refuge to allow the ship to be repaired, is general average. The freight of goods sacrificed must be paid to the captain, as in computing the amount to be made good to the owner of the goods, the freight is not deducted from their value at their destination.

Sacrifices of Ship.

The jettison of ship's stores is not allowed as general average when they are improperly carried on deck. Thus, water casks or hawsers kept on deck are only contributed for on short coasting voyages. On other voyages it is the duty of the captain to keep them below.

Damage by carrying a press of sail is treated as general average, but it seems that effect is not given to this rule unless the necessity for the press of sail is clearly proved.

The loss of masts and other ship's materials cut away to save the ship is general average, even when they are in a state of wreck; but the damage sustained before the sacrifice is in that case deducted. So also anchors and cables slipped or cut away to avert a loss, are contributed for.

Loss of, or damage to, ship's materials in the efforts made to refloat a stranded vessel is general average, as is also damage to the machinery, and fuel expended, for the same purpose.

Damage to the ship in defending her against an enemy, the ammunition expended and the cost of caring for the wounded, are allowed in general average.

When the ship is wrecked, damage done by cutting open her sides or deck to save cargo must be made good by the cargo.

Voluntary Stranding.

Damage by voluntary stranding is allowed in general average, unless the ship is not saved. If the ship must inevitably go ashore, the master only having the power to guide the ship to the least dangerous spot, the stranding is not considered voluntary.

Port of Refuge Expenses.

The expenses of entering a port of refuge for necessary repairs, and of leaving it, are general average, including pilotage, towage, port dues, &c., and the cost of fuel consumed by a steamship in bearing away.

A distinction seems to be made between the loss of the vessel and damage done to her, if she strands in entering the port of refuge. The former is not general average, apparently the latter is.

If the cargo has to be discharged for the repairs, the expenses of unloading, storing, reloading, and stowing it are general average. As we have already mentioned, a loss of the goods by fire or robbery while they are in the warehouse is also allowed in general average. Generally speaking, the expenses specially incurred to preserve the cargo from deterioration after the discharge fall on the cargo alone; but some allowance might be made for the cost of their preservation, if the period of warehousing was extraordinarily prolonged.

When cargo has to be unloaded solely on account of its damaged condition, the expenses of discharging and reconditioning it are a charge on the cargo alone. When, however, the discharge is necessary both for the repair of the ship and on account of the damaged state of the cargo, the expense of the discharge is divided.

If it be impossible to reload goods, such as cotton, unloaded at the port of refuge, owing to the lack of appliances for pressing them, the loss to the owner of the goods is treated as general average. There would be no loss of freight *to the shipowner*, as the freight would have to be paid in full.

The cost of temporary repairs at a port of refuge is general average, as is also the cost of forwarding cargo by another ship, to avoid the cost of landing and warehousing.

The wages and maintenance of the crew while the ship is being repaired are allowed in general average; but no allowance would be made for a further delay caused by the port becoming frozen up, as this delay would be due to an accidental cause, not to a general average sacrifice.

In case of delay at the port of loading or of destination, in consequence of a general average loss, the port would be treated as a port of refuge, and the additional port expenses and the wages and maintenance of the crew during the delay allowed in general average.

The costs of raising funds to defray general average expenses, such as the premium on a bottomry loan, commissions, insurance of advances, loss on cargo sold to raise the money, are allowed in general average.

Salvage.

The expenses of salving the ship and cargo are usually general average; but in the case of complex salvage operations, the expenses particular to one interest are charged to that interest.

Adjustment of General Average.

The proper place of adjustment, when the vessel accomplishes the voyage with the cargo on board, is the final port of discharge.

When the voyage is broken up at a port of refuge, the adjustment is made there, and the cargo is bound by a bond, enforceable when it reaches its destination, to pay its contribution. If, however, the ship and cargo are both sold at the port of refuge, this port is the proper place for the adjustment of the general average and payment of contributions according to the law of that place.

If the ship is obliged by an accident to return to the port of departure, the same rule applies as in the case of any other port of refuge. To avoid litigation, the usual mode of adjustment in Austria is to appoint two adjusters who, under the terms of the average bond, are in the position of arbitrators and, if they differ, have the right to appoint a third adjuster as umpire, their decision or that of the umpire being final.

Amount made good.

The amount made good for cargo sacrificed is the market price of the goods at their destination, without deducting the freight, which must be paid to the captain.

One-third is usually deducted from the cost of repairs to ship, but no deduction is made in the case of a vessel which has not been afloat for a year, and the cost of replacing anchors, chains and other iron articles is allowed in full. Interest is allowed on all claims made good in general average.

Contributing Interests and Values.

The cargo contributes on its value at the place where the different interests, *i.e.* ship, freight and cargo separate, the freight and expenses of landing, such as duty, landing-charges, &c., being deducted. No deduction is made on account of insurance premiums or expenses of sale. Deck cargo contributes, even though it would not have been contributed for, if lost.

The vessel contributes on one-half of her value, as estimated by surveyors, in her condition as saved at the port of destination. The amount made good to her also contributes on one-half of the allowance.

The freight contributes on one-half of the gross amount at risk when the general average act occurred, including freight paid in advance and the freight of goods sacrificed, as the latter freight is not deducted from the market price of the goods, and is paid to the captain.

Where, however, the vessel is wrecked or condemned at an intermediate port, and the cargo is sold there or forwarded to its destination, so that the original vessel only receives distance freight, the contribution is only on one-half of the amount of the distance freight.

The chartered freight of a vessel in ballast does not contribute, as an adjustment is not considered necessary in this case.

Money lent on bottomry contributes, as do bank-notes and securities, if they are not replaceable in case of loss.

Specie contributes on its full value, but if saved soon after a stranding, is not usually made to contribute to subsequent salvage expenses.

Provisions, ammunition, and the wages and effects of the crew do not contribute, though they are contributed for, if sacrificed.

APPENDIX E.

THE LAW OF BELGIUM.

THE editors are indebted to Mr. Léon Van Péborgh, average adjuster, of Antwerp, for the following memorandum on the law of Belgium relating to general average and maritime commerce:—

In Belgium maritime commerce was governed by the provisions of Book XI. of the French *Code de Commerce* of 1807, until on the 21st April, 1879, the Legislature (utilizing the labours of the Conferences of the "Association for the Reform and Codification of the Law of Nations," which had resulted in the adoption of the "York-Antwerp Rules" for the regulation of general average) promulgated a special law, which from that date constituted Book II. of the Belgian *Code de Commerce*. This law deals with the legal position of ship-owners and seamen, average and its adjustment, the carriage of passengers, mortgages of vessels, bottomry, marine insurance, collision, pleas in bar and limitations.

It was soon noticed that although the law of the 21st April, 1879, had to some extent modernized the law, and had in particular made the law of general average approximate to the York-Antwerp Rules, it had made no change in the *Code de Commerce* of 1807 with regard to rights *in rem*, did not deal at all with inland navigation, did not limit the liability of shipowners, and continued an antiquated system of pleas in bar and limitations.

It needed long-continued and persistent efforts on the part of the "Belgian Association for the Unification of Maritime Law" (which is affiliated to the "International Maritime Committee" founded at Antwerp in 1897), to induce the Belgian Government to present a Bill to the Legislative Chambers for the purpose of remedying these defects. At last, however, the Law of the 10th February, 1908, was passed, which repealed and took the place of the Law of the 21st April, 1879, and brought the Belgian legislation with regard both to deep-sea and inland navigation into harmony with modern requirements. A brief account of this measure may be interesting.

The Law of the 10th February, 1908, reproduces the provisions of the former law on several subjects, especially average and its adjust-

ment. It has re-organized the system of registration of ships, and of craft engaged in inland navigation.

The register of merchant shipping is based on the names of vessels, but there are supplementary registers of the names of the owners.

The new Law has largely reduced the number of liens which took precedence of mortgages, and has limited their duration. Thus, the only liens that remain, besides those for legal expenses and the wages of the crew for six months, are the liens for salvage and collision damage. These liens expire at the end of one year from the time when they came into existence.

It has simplified and improved the rules relating to hypothecation, and assimilated them to the resolutions of the Venice Conference of 1907, which were inspired by one dominant principle, viz., to place maritime credit on a sound basis, under practical conditions which correspond more to the real necessities of modern navigation than to theoretical considerations, derived from the civil law and traditional ideas. It has also enabled the mortgagee, whenever the mortgagor has made default, to place a captain of his choice on board the ship, by means of a simple order of Court. It places no obstacle in the way of mortgages by means of bearer debenture-bonds.

It has modernized the law relating to abandonment. While affirming the civil responsibility of the shipowner for the acts of the captain and crew, and for the contractual obligations of the captain incurred in the performance of his duties, it enables the shipowner to free himself from all liability either by abandoning the ship and freight, or, as an alternative to the abandonment of the ship, by paying its value at the end of the voyage or a sum corresponding for each voyage to 200 francs per ton of the ship's gross register. This limitation of liability is available against the claims of the State and of public authorities.

This law abolished the numerous pleas in bar formerly allowed. Thus it has become unnecessary to make a protest by a bailiff (*huissier*) within twenty-four hours, and to issue a writ within a month, in cases of collision, general average and marine insurance. It is sufficient in order to recover for general average or short delivery of cargo to protest by an ordinary letter within forty-eight hours of the delivery of cargo, and to follow up this protest within a month by entering an action in court. Even these conditions need not be complied with, when the matter has been regularly authenticated before the unloading of the cargo.

A valuation can be obtained by a simple request; as can an order for the deposit or sequestration of goods, or their sale to the amount of the freight.

Finally, this Law has assimilated inland navigation to deep-sea navigation in essential matters, especially with regard to bills of lading,

general average, insurance and collision. An exception has, however, been made with regard to Art. 154, which relates to the jettison of deck-cargo, and of goods for which there is neither a bill of lading nor a declaration by the captain. This article is only applicable to sea voyages.

We have already seen that the Law of the 10th February, 1908, has not altered the provisions of the Law of the 21st April, 1879, relating to general average and its adjustment. Only the numbering of the sections has been changed. It may, however, be convenient to indicate the changes which were effected by the Law of 1879, and which brought the Belgian *Code de Commerce* into closer agreement with the York-Antwerp Rules.

Art. 147 of the existing Law, re-enacting Art. 102 of the Law of 1879, omits the detailed specification contained in Art. 400 of the Code of 1807, and only retains the final paragraph thereof, which is as follows:—"Extraordinary expenses incurred, and damage sustained voluntarily for the common good and safety of the ship and cargo, are general average. All other averages are particular."

But a supplementary Article No. 148 (No. 103 in the Law of 1879, in which it was for the first time enacted) includes in general average the expenses of any port of refuge made in consequence of a sea peril common to ship and cargo, including in these expenses the wages and victuals of the crew from the time of entering the port of refuge to the time when the ship has again been made fit to continue its voyage. As a consequence of this provision, and in conformity with the discussions in the legislative Chambers, the cost of discharging the cargo, the warehouse charges, and the expenses of entering and leaving the port, &c., are also allowed as general average. They are considered part of the expenses resulting directly from putting into the port of refuge.

Art. 149 (Art. 104 in the Law of 1879), modifying Arts. 401 and 404 of the Code of 1807, provides that general average shall be borne by the goods, the ship and the net freight, in proportion to their values. Under the Code of 1807, the ship and freight contributed only on the half of their values.

Art. 150 (Art. 105 in the Law of 1879) has modified the Code of 1807 by fixing, as the equivalent of the net freight, half the gross amount of so much of the freight as has not been paid in advance or is liable to be repaid.

Arts. 152 and 155 (Arts. 107 and 110 in the Law of 1879) have modified Arts. 414 and 417 of the Code of 1807 by providing that in estimating the contributory value of the goods, freight paid in advance and not liable to be repaid is not to be deducted, and that the ship only contributes on its value at the port of discharge, *i.e.*, if it arrives damaged it contributes on its damaged value, to which the amount

made good in general average for the sacrifice of the ship's stores, &c. must be added. If the ship arrives in good condition after having been repaired at a port of refuge, the costs of the repairs necessarily effected there must be deducted from her value at the port of discharge.

The provisions relating to freight, which had been altered in several important respects in the Law of 1879, have also remained unchanged in the present Law, except as regards the numbering of the articles.

Before 1879, distance freight was allowed if the ship was condemned at a port of refuge and the goods were reshipped on another vessel. According to par. 3 of Art. 142 (Art. 97 in the Law of 1879), no freight is due for goods which, after the ship has been wrecked or declared to be innavigable, do not reach their destination. Further, par. 4 provides that if the goods are carried to their destination at a lower freight than the original freight, the difference between the two freights must be paid to the captain of the original ship. Nothing, however, is due to him if the new freight is equal to the original freight, and if the new freight exceeds it, the excess is to be borne by the shipper.

Since the Law of 1879, the captain is in no case authorized (not even on short coasting voyages) to load cargo on deck, and if deck cargo be jettisoned, it is not contributed for.

In relation to freight, one lacuna remains which the "Belgian Association for the Unification of Maritime Law" is at this moment striving to fill, viz., how to deal with the freight of damaged goods which have been disposed of in the course of the voyage, when the ship completes the voyage with the rest of her cargo.

The Legislature ought, no doubt, in 1879, to have incorporated the York-Antwerp Rules in their integrity in the Law enacted only a short time after these Rules came into force. But although this was not thought advisable, practice has supplemented the law. Thus the Belgian usages recognize as general average damage caused to the ship or cargo by jettison or any other sacrifice for the common safety; damage done to the engines and boilers in attempting to refloat a steamship; expenses incurred and damage sustained in refloating a stranded vessel; loss of cargo, ship's materials or stores used for fuel; damage or loss of cargo inevitably sustained in consequence of its being discharged, warehoused, reloaded or stowed at a port of refuge; loss of freight resulting from damage to or loss of cargo caused by a general average act.

The usages of Antwerp also agree with the York-Antwerp Rules as regards loss or damage caused by cutting away wreckage, and as regards the consequences of a voluntary stranding or of carrying a press of sail, all of which (subject to the exceptions mentioned) are particular average.

The York-Antwerp Rules and the usages of Antwerp differ in the case of extinguishing fire on shipboard. The former do not allow contribution for the damage done by water to packages which have been on fire; the latter, while treating the damage by fire as particular average, allow the damage done by water to the same goods as general average. The only other difference between the York-Antwerp Rules and the Belgian usages is with regard to deductions from the cost of repairs, the rate of which in the Rules varies according to the construction and age of the ship and the nature of the materials sacrificed, while under the Antwerp usages there is a uniform deduction of one-third, except for anchors, which are contributed for without deduction, and steel or copper wire hawsers and chains, from which only 15 per cent. is deducted.

The existing Law, like the Law of 1879 and the Code of 1807, requires that the adjustment of average losses shall be made at the ship's place of discharge by experts called average adjusters (*dispacheurs*), appointed in Belgian ports by the President of the Chamber of Commerce, and in foreign ports by the Belgian consul. As, however, the necessities of maritime trade cannot be reconciled with the slowness, expense and worry of judicial proceedings, the custom has grown up in Belgium of having friendly adjustments made without any judicial formalities, a course which is authorized by law, as Art. 145 provides that, "in default of special agreements between all the parties," averages are regulated in conformity with the provisions of the Code that follow.

The parties interested in the ship and cargo agree to have a friendly adjustment made (*a*), by signing an average bond, the form of which was by general consent amended in 1910, and reads now as follows:—

(a) In *The S.S. Zora*, 2nd November, 1909, the parties had taken this course, but some of them other than the captain had, in signing the agreement, reserved all rights of appeal. The Court of Appeal of Brussels held that the captain could not avail himself of this reservation in order to contend that some of the expenses with which the average adjusters had charged him ought to be contributed for as general average; and the Court intimated that even if the reservation had been made by all the parties, it would not have the effect of enabling any of them to dispute the apportionment.

In *The S.S. Germa*, 15th June, 1910, a similar agreement had been made between the captain and the charterer, who was also the receiver of the cargo, which consisted of wood partly laden on deck. The charter-party incorporated the York-Antwerp Rules, but the captain signed a bill of lading which provided that the jettison of deck cargo should be allowed as general average, and produced it to the adjusters, who in accordance therewith allowed such jettison as general average. The Court of Appeal of Brussels held that the captain could not, as between the parties to the charter-party, vary the terms of the charter-party contract by the bill of lading, and remitted the average statement to the adjusters to alter it so as to give effect to the York-Antwerp Rules.

Avarie Commune.

Entre: le capitaine commandant le navire d'une part
et le consignataire du chargement d'autre part.

Attendu que le capitaine déclare .

Vu l'impossibilité de pouvoir dès à présent fixer la part que la cargaison ainsi que le navire et le frêt auraient à contribuer dans les avaries alléguées & afin d'éviter des délais et des frais judiciaires & pour avoir libre disposition de la cargaison;

Il a été convenu ce jour entre parties:

Que toutes les pièces relatives à cette affaire seront remises à ,
Dispacheurs, agréés au Tribunal de Commerce d'Anvers, aux fins de déterminer, de classer & de répartir les avaries d'après la loi, les conventions des parties, les us et coutumes sur la matière, en les dispensant du serment & des formalités judiciaires, même du dépôt;

Qu'après le débarquement, le consignataire remettr le plus tôt possible une déclaration de la valeur des marchandises reçues au prix de la place, sous déduction du frêt, des droits, des frais ordinaires & du dommage éventuel;

Que l'évaluation du navire sera faite par experts;

Que le capitaine se réserve le droit de réclamer une contribution provisoire dont l'import sera déterminé par lui de commun accord avec les dispacheurs ci-dessus désignés;

Que les parties régleront à Anvers à première réquisition la quôte-part des avaries & dépenses qui leur incombera, étant entendu que la mission de Mess. les Dispacheurs est celle prévue aux art. 163 & 164 de la loi maritime & qu'en conséquence les parties auront conformément à ces articles & nonobstant la présente convention le droit de soumettre le règlement à justice.

Ainsi fait en deux exemplaires, dont l'un remis au capitaine d'une part & l'autre pour toutes les parties d'autre part, ce dernier restant déposé chez M. dispacheur.

Anvers, le .

Mr. Van Péborgh has also supplied the editors with a copy of the form of underwriters' guaranty for the payment of general average, now in use in Belgium. It is as follows:—

(Date)

S.S.

de

à

Le soussigné, en vue d'éviter le versement en espèces du dépôt provisoire d'avarie commune, déclare par le présent se porter fort, et ce jusqu'à concurrence des sommes assurées, vis-à-vis de M.M. ,

Agents de l'Armement du susdit steamer, pour la bonne exécution par les réceptionnaires du Règlement Général des Avaries à intervenir

à la suite des événements survenus en cours du voyage (à détailler).

Réceptionnaires (ou à défaut) Chargeurs.	Marchandises.

Signatures of the Insurers or
their Representatives.

The principal articles of the Law of the 10th February, 1908, which relate to general average and freight, are the following:—

(N.B.—The numbers in brackets are those of the corresponding articles in the Law of 1879.)

TITRE III.

CHAPITRE III.—DES AVARIES ET DE LEUR RÈGLEMENT.

Art. 144 (99). Toutes dépenses extraordinaires faites pour le navire et les marchandises, conjointement ou séparément;

Tout dommage qui arrive au navire ou aux marchandises, depuis leur chargement et départ jusqu'à leur retour et déchargement,

Sont réputés avaries.

Art. 145 (100). A défaut de conventions spéciales entre toutes les parties, les avaries sont réglées conformément aux dispositions ci-après.

Art. 146 (101). Les avaries sont de deux classes: avaries communes et avaries particulières.

TITLE III.

CHAPTER III.—OF AVERAGES AND THEIR ADJUSTMENT.

Art. 144 (99). All extraordinary expenses incurred for the ship and the cargo, conjointly or separately; all damage happening to the ship or cargo, from the loading and departure until the arrival and discharge, are considered averages.

Art. 145 (100). In default of special agreements between all the parties, averages are regulated in conformity with the following provisions.

Art. 146 (101). Averages are of two classes: general average and particular average.

Art. 147 (102). Sont avaries communes: les dépenses extraordinaires faites et les dommages soufferts volontairement pour le bien et salut commun du navire et des marchandises.

Toutes autres avaries sont particulières.

Art. 148 (103). Sont toutefois considérées comme avaries communes les dépenses de toute relâche effectuée à la suite de fortune de mer, qui mettrait le navire et la cargaison, si la navigation était continuée, en état de péril commun.

Sont compris dans ces dépenses, les gages et la nourriture de l'équipage, depuis le port de relâche jusqu'au moment où le navire aura été remis en état de continuer son voyage.

Si la relâche est motivée par des avaries qui soient reconnues provenir du vice propre du navire ou d'une cause imputable au capitaine ou à l'équipage, les dépenses sont avaries particulières au navire.

Si la relâche est motivée par la fermentation spontanée ou par d'autres vices propres de la marchandise, toutes les dépenses sont avaries particulières à la marchandise.

Art. 149 (104). Les avaries communes sont supportées par les marchandises, par le navire et par le montant net du fret, au marc le franc de leur valeur.

Les avaries particulières sont supportées et payées par le pro-

Art. 147 (102). Extraordinary expenses incurred, and damage sustained voluntarily for the common good and safety of the ship and cargo, are general average.

All other averages are particular.

Art. 148 (103). The expenses of any port of refuge made in consequence of sea peril which, if the voyage had been continued, would have involved the ship and cargo in a state of common peril, are always considered general average. The wages and provisions of the crew, from the entry into the port of refuge until the ship has been placed in a condition to continue the voyage, are comprised in these expenses. If the reason of putting in is damage known to arise from the *vice propre* of the ship, or from a cause chargeable to the master or the crew, the expenses are particular average on the ship. But if required because of spontaneous fermentation, or other *vice propre* of the goods, all the expenses are particular average on the cargo.

Art. 149 (104). General average is borne by the cargo, the ship, and the net amount of the freight in proportion to their values.

Particular average is borne and paid by the owner of the property

propriétaire de la chose qui a essuyé le dommage ou occasionné la perte.

Art. 150 (105). Le fret non payé ou payé d'avance et restituable ne contribue que pour la moitié de son montant brut.

Art. 151 (106). Les munitions de guerre et de bouche, les hardes et salaires des gens de l'équipage et les bagages des passagers ne contribuent pas à l'avarie commune; leur valeur sera payée par contribution sur tous les autres effets.

Art. 152 (107). Toute marchandise préservée contribue pour sa valeur nette au lieu du déchargement ou son produit net, déduction faite du fret à payer. Le fret payé d'avance et non restituable n'est pas déduit.

Les marchandises jetées ou sacrifiées sont remboursées pour leur valeur, fret compris, à charge de payer le fret. Elles contribuent pour leur valeur, fret déduit, de la même manière que les marchandises préservées.

Art. 153 (108). La qualité des marchandises est constatée par la production des connaissements et des factures, s'il y en a.

Si la qualité des marchandises a été déguisée par le connaissement, et qu'elles se trouvent d'une plus grande valeur, elles contribuent sur le pied de leur estimation, si elles sont sauvées.

which has sustained the damage or occasioned the loss.

Art. 150 (105). Freight unpaid, or paid in advance and liable to be repaid, contributes only upon one-half of its gross amount.

Art. 151 (106). Munitions of war, victuals, the effects and wages of the crew and the baggage of the passengers, do not contribute to general average; their value is repaid by contribution from all the other effects.

Art. 152 (107). All goods preserved contribute upon their net value at the place of discharge or their net proceeds, after deducting the freight to be paid. Freight prepaid and not returnable is not deducted.

Goods jettisoned or otherwise sacrificed are contributed for upon their value, including freight, and are liable to pay freight. They contribute upon their value, less the freight, in the same manner as goods saved.

Art. 153 (108). The quality of the goods is evidenced by the production of the bills of lading and invoices, if there are any. If the quality of the goods has been disguised in the bill of lading, and they possess a greater value, they contribute, if they are saved, according to their real worth. They are paid for according to the

Elles sont payées d'après la qualité désignée par le connaissement, si elles sont perdues.

Si les marchandises déclarées sont d'une qualité inférieure à celle qui est indiquée par le connaissement, elles contribuent d'après la qualité indiquée par le connaissement, si elles sont sauvées.

Elles sont payées sur le pied de leur valeur, si elles sont jetées ou endommagées.

Art. 154 (109). Les effets dont il n'y a pas de connaissement ou déclaration du capitaine ne sont pas payés s'ils sont jetés; ils contribuent s'ils sont sauvés.

Les effets chargés sur le tillac du navire contribuent s'ils sont sauvés. S'ils sont jetés ou endommagés par le jet, le propriétaire n'est point admis à former une demande en contribution; il ne peut exercer son recours que contre le capitaine.

Art. 155 (110). Le navire contribue par sa valeur au lieu du déchargement.

Art. 156 (111). Si le jet ne sauve pas le navire, il n'y a lieu à aucune contribution.

Les marchandises sauvées ne sont point tenues du paiement ni du dédommagement de celles qui ont été jetées ou endommagées.

Art. 157 (112). Si le jet sauve le navire, et si le navire, en continuant sa route, vient à se perdre, les effets sauvés contribuent au jet sur le pied de leur valeur, en l'état

value designated by the bill of lading, if they are lost.

If the goods are of a quality inferior to that indicated in the bill of lading, they contribute according to the value indicated in the bill of lading, if they are saved. They are paid for according to their value if they are jettisoned or damaged.

Art. 154 (109). Effects for which there is no bill of lading or declaration of the master, are not paid for if they are jettisoned; they contribute if they are saved.

Effects loaded upon the deck of the ship contribute if they are saved. If they are jettisoned or damaged by a jettison, the owner is not allowed to make a claim for contribution; his only remedy is against the master.

Art. 155 (110). The ship contributes upon her value at the place of discharge.

Art. 156 (111). If the jettison does not save the ship, there is no ground for any contribution. The goods saved are not bound for the payment or indemnity of those which have been jettisoned or damaged.

Art. 157 (112). If the jettison saves the ship, and if the ship, in continuing the voyage, is lost, the effects saved contribute to the jettison in proportion to their

où ils se trouvent, déduction faite des frais de sauvetage.

Art. 158 (113). Les effets jetés ne contribuent, en aucun cas, au paiement des dommages arrivés depuis le jet aux marchandises sauvées.

Les marchandises ne contribuent point au paiement du navire perdu ou réduit à l'état d'innavigabilité.

Art. 159 (114). Dans tous les cas ci-dessus exprimés, le capitaine et l'équipage sont privilégiés sur les marchandises ou le prix en provenant pour le montant de la contribution.

Ils ne peuvent toutefois retenir les marchandises, si le destinataire donne caution pour le paiement de la contribution.

Art. 160 (115). Si, depuis la répartition, les effets jetés sont recouvrés par les propriétaires, ils sont tenus de rapporter au capitaine et aux intéressés ce qu'ils ont reçu dans la contribution, déduction faite des dommages causés par le jet et des frais de recouvrement.

Art. 161 (116). Le capitaine est tenu de rédiger par écrit le procès-verbal du jet et des autres sacrifices faits, aussitôt qu'il en a les moyens. Le procès-verbal énonce les motifs qui ont déterminé le sacrifice, les choses sacrifiées, abandonnées, jetées ou endommagées. Il est signé du capitaine et des principaux de l'équipage, ou

value, in the state in which they are found, deduction being made of the charges of saving them.

Art. 158 (113). Effects jettisoned do not contribute in any case to the payment of damage happening after the jettison to the goods saved.

Goods do not contribute to the payment of the ship lost or rendered innavigable.

Art. 159 (114). In all the cases above-mentioned, the master and crew have a lien on the goods or their proceeds for the amount of their contribution.

They may not, however, retain the goods, if the consignee gives security for the payment of the contribution.

Art. 160 (115). If, after the apportionment, the effects jettisoned are recovered by their owners, they are obliged to refund to the captain, and others interested, what they have received in contribution, less the damage caused by the jettison, and the costs of salvage.

Art. 161 (116). The captain is bound to draw up in writing a formal statement of the jettison and other sacrifices made as soon as possible. This account must detail the reasons for the sacrifice and what goods were sacrificed, abandoned, jettisoned, or damaged. It is signed by the captain and principal members of the

énonce les motifs de leur refus de signer. Il est transcrit sur le registre.

Art. 162 (117). Au premier port où le navire abordera, le capitaine est tenu, dans les vingt-quatre heures de son arrivée, d'affirmer les faits contenus dans le procès-verbal.

Art. 163 (118). L'état des pertes et dommages est fait dans le lieu du déchargement du navire, à la diligence du capitaine et par experts.

Les experts sont nommés par le Tribunal de Commerce, si le déchargement se fait dans un port belge.

Dans les lieux où il n'y a pas de Tribunal de Commerce, les experts sont nommés par le juge de paix.

Ils sont nommés par le consul de Belgique, et, à son défaut, par le magistrat du lieu, si la décharge se fait dans un port étranger.

Les experts prêtent serment avant d'opérer.

Art. 164 (119). Les experts nommés en vertu de l'article précédent font la répartition des pertes et dommages.

La répartition est rendue exécutoire par l'homologation du tribunal.

Dans les ports étrangers, la répartition est rendue exécutoire par le consul de Belgique, ou, à son défaut, par tout tribunal compétent sur les lieux.

crew, or states the motive of their refusal to sign. It is copied into the ship's log.

Art. 162 (117). At the first port into which the ship enters, the captain is bound within twenty-four hours of his arrival to affirm the facts stated in the formal statement.

Art. 163 (118). The account of the losses and damages is made in the place of the ship's discharge, at the instance of the captain and by experts.

The experts are named by the Tribunal of Commerce if the discharge is made in a Belgian port. In places where there is no Tribunal of Commerce, the experts are nominated by the justice of the peace. They are named by the Belgian consul, or, in his absence, by the magistrate of the place, if the discharge is made in a foreign port. The experts are sworn before they commence their work.

Art. 164 (119). The experts nominated under the provisions of the preceding Article make the apportionment of the losses and damages. The apportionment is rendered executory by official confirmation by the Tribunal.

In foreign ports the apportionment is rendered executory by the Belgian consul, or failing him by some competent tribunal of the place.

*TITRE I.*CHAPITRE III. SECT. II.—DES
NAVIRES ET AUTRES BATIMENTS
DE MER.

Art. 34 (149). En cas de perte ou d'innavigabilité du navire, les droits du créancier s'exercent sur les choses sauvées ou sur leur produit, alors même que la créance ne serait pas encore exigible.

Dans le cas de règlement d'avaries concernant le navire, le créancier hypothécaire peut intervenir pour la conservation de ses droits; il ne peut les exercer que dans le cas où l'indemnité, en tout ou en partie, n'aurait pas été ou ne serait pas employée à la réparation du navire.

*TITRE II.*CHAPITRE I.—DES PROPRIÉ-
TAIRES DE NAVIRES ET DES
EQUIPAGES.

Art. 46 (7). Tout propriétaire de navire est civilement responsable des faits du capitaine et tenu des engagements contractés par ce dernier dans l'exercice de ses fonctions; il est civilement responsable des faits de l'équipage et des préposés qui en font l'office dans l'exercice de leurs fonctions respectives.

Il peut, dans tous les cas, s'affranchir de ces obligations et des frais et indemnités dus à raison d'assistance ou de sauvetage par l'abandon du navire et du fret.

*TITLE I.*CHAPTER III. SECT. II.—OF
SHIPS AND OTHER SEA-GOING
CRAFT.

Art. 34 (149). In case of the loss or innavigability of the ship, the rights of the creditor are exercised on the articles which have been saved or their proceeds, even if the mortgage debt cannot yet be enforced.

When there is an adjustment of average in which the ship is interested, the mortgage creditor can intervene for the protection of his rights; he cannot, however, enforce them unless the indemnity (either in whole or in part) has not been, or will not be, used for the repair of the ship.

*TITLE II.*CHAPTER I.—OF SHIPOWNERS
AND SHIPS' CREWS.

Art. 46 (7). Every shipowner is civilly responsible for the acts of the captain and bound by his contracts made in the fulfilment of his duties; he is civilly responsible for the acts of the crew, and of the substitutes who do their work, in the fulfilment of their respective duties.

He can, in every case, free himself from such responsibility and from liability for salvage charges by abandoning the ship and freight.

Art. 47. Le propriétaire peut remplacer l'abandon du navire par le paiement de sa valeur à la fin du voyage ou d'une somme correspondant, pour chaque voyage, à 200 francs par tonne de jauge brut de son bâtiment.

Il ne peut user de cette dernière faculté pour se libérer des frais et indemnités dus à raison d'assistance et de sauvetage.

Les dispositions qui précèdent ne préjudicient pas au droit des créanciers de saisir conservatoirement le navire en cours de voyage ou d'exiger caution.

Art. 48. Le voyage est réputé fini après débarquement complet des marchandises et des passagers se trouvant à bord au moment où l'obligation est née.

Art. 49. L'abandon ne comprend pas le recours du propriétaire contre l'assureur.

Art. 50. Le propriétaire est tenu de suppléer en espèces les sommes qui, par suite de privilège ou d'hypothèque, seraient prélevées sur la valeur du navire ou du fret par des créances ayant contre le propriétaire une action personnelle dont il ne pourrait s'affranchir par abandon.

Art. 51. La faculté de se libérer par abandon ne s'étend pas aux obligations dérivant de fautes personnelles du propriétaire, des contrats passés par lui ou de ceux qu'il a autorisés ou ratifiés. Elle appartient à celui qui est à la fois

Art. 47. The shipowner can substitute for the abandonment of the ship the payment of its value at the end of the voyage or of a sum corresponding, for each voyage, to 200 francs per ton of her gross tonnage.

He cannot avail himself of the last-named limitation to free himself from salvage expenses.

The preceding provisions do not affect the right of creditors to arrest the ship in the course of the voyage and to require bail.

Art. 48. The voyage is deemed to be finished when the goods and passengers who were on board when the liability arose have all been landed.

Art. 49. Abandonment does not include the claims of the shipowner against the insurer.

Art. 50. The shipowner is bound to provide in cash the sums which by way of lien or mortgage have been secured on the ship and freight in respect of charges which give a personal right of action against the shipowner, from which he cannot release himself by abandonment.

Art. 51. The right of the shipowner to free himself from liability by abandonment does not extend to liabilities arising from his own fault, or from contracts made by himself, or which he has authorized, or ratified. It can be

capitaine et propriétaire du navire pour le dommage causé par lui dans la conduite du navire, le cas de dol excepté.

Art. 52. En cas de naufrage d'un navire dans les eaux territoriales, bassins, ports ou rades comme aussi en cas d'avaries causées par un navire aux ouvrages d'un port, le propriétaire peut se libérer par l'abandon, même envers l'État et les administrations publiques, de toute dépense d'extraction et de réparation, ainsi que de tous dommages-intérêts.

Art. 53. L'affrèteur et l'armateur tenus de la responsabilité du propriétaire du navire peuvent user de la faculté d'abandon dans les mêmes conditions que celui-ci.

CHAPITRE II. SECT. I.

Art. 58 (12). Tout capitaine, maître ou patron, chargé de la conduite d'un navire ou autre bâtiment, est garant de ses fautes, même légères, dans l'exercice de ses fonctions.

Art. 59 (13). Il est responsable des marchandises dont il se charge. Il en fournit une reconnaissance; cette reconnaissance se nomme connaissement.

Art. 66 (20). Le capitaine répond également de tout le dommage qui peut arriver aux mar-

exercised by one who is both the captain and owner of the ship, in respect of injury caused by him in the management of the ship, cases of fraud excepted.

Art. 52. In case of the ship being wrecked in territorial waters, basins, ports, or roadsteads, or of damage being caused by a ship to harbour works, the shipowner can free himself by abandonment, even as against the State and public authorities, from liability for the cost of raising the ship and of repairs, or for damages.

Art. 53. The charterer or ship's husband who has the liability of a shipowner can exercise the right of abandonment under the same conditions as the latter.

CHAPTER II. SECT. I.

Art. 58 (12). Every captain, master or skipper who is entrusted with the command of a ship or other vessel is responsible for his faults, though trifling, committed in the exercise of his employment.

Art. 59 (13). He is responsible for the goods which he takes on board. He gives a receipt for them which is called a bill of lading.

Art. 66 (20). The captain is also responsible for all damage sustained by goods which he carries

chandises qu'il aurait chargées sur le tillac de son vaisseau sans le consentement par écrit du chargeur.

Est assimilée au tillac toute construction ne faisant pas corps avec la membrure du vaisseau.

Art. 67 (21). La responsabilité du capitaine ne cesse que par la preuve d'obstacle de force majeure.

Art. 78 (32). Le capitaine est tenu, dans les 24 heures de son arrivée, de faire viser son registre et de faire son rapport.

Le rapport doit énoncer le lieu et le temps de son départ, la route qu'il a tenue, les hasards qu'il a courus, les désordres arrivés dans le navire et toutes les circonstances remarquables de son voyage.

Art. 90 (45). En cas de naufrage ou de relache forcée, tout porteur d'un connaissement, alors même qu'il serait à personne dénommée, peut exercer tous les droits du chargeur, se faire délivrer la marchandise par le capitaine et en toucher le produit, à la charge de fournir caution et en se faisant autoriser, en Belgique par le Tribunal de Commerce, en pays étranger par le Consul de Belgique ou le magistrat du lieu, qui prescriera telles mesures conservatoires des droits des tiers qu'il jugera convenables.

on the deck of his vessel without the written consent of the shipper.

Every structure which is not built in with the frame of the ship is deemed to be part of the deck.

Art. 67 (21). The liability of the captain is only ended by proof of the intervention of *vis major*.

Art. 78 (32). The captain is bound within twenty-four hours of his arrival to have his log examined, and to make his report.

The report must specify the port and time of departure, his route, the perils which he has encountered, the disturbances which have taken place on the ship and all the remarkable events of the voyage.

Art. 90 (45). In case of shipwreck or of making a port of distress, every holder of a bill of lading, even when it is made out to a specified person, can exercise all the rights of the shipper, have the goods delivered to him by the captain and receive the proceeds thereof, on condition of giving bail and of obtaining the authorization, in Belgium of the Tribunal of Commerce, or in a foreign country of the Belgian consul or the local magistrate, who will impose such terms as he considers advisable for the protection of the rights of third parties.

TITRE III.

CHAPITRE II. SECT. II.—DE LA
CHARTER-PARTIE ET DU CON-
TRAT DE LOUAGE MARITIME.

Art. 122 (77). Le chargeur ne peut abandonner pour le fret les marchandises diminuées de prix ou détériorées par leur vice propre ou par cas fortuit.

Si toutefois des futailles contenant vin, huile, miel et autres liquides, ont tellement coulé qu'elles soient vides ou presque vides, lesdites futailles pourront être abandonnées pour le fret.

Art. 124 (79). Le capitaine ne peut retenir les marchandises dans son navire faute de paiement de son fret.

Il peut, dans le temps de la décharge, demander le dépôt en mains tierces jusqu'au paiement de son fret.

Art. 125 (80). Le capitaine est préféré, pour son fret, et le remboursement des avaries, s'il y a lieu, sur les marchandises de son chargement, pendant quinzaine après leur délivrance, si elles n'ont passé en mains tierces.

Art. 130 (85). Si le vaisseau est arrêté par une force majeure dans le cours de son voyage, il n'est dû aucun fret pour le temps de sa détention, si le navire est affrété pour un prix fixé par période de temps, ni augmentation de fret, s'il est loué au voyage.

La nourriture et les loyers de

TITLE III.

CHAPTER III. SECT. II.—OF
CHARTER-PARTIES AND CON-
TRACTS OF HIRE OF SHIPS.

Art. 122 (77). The freighter cannot abandon for freight goods diminished in price or deteriorated by their *vice propre* or by accident.

If, however, casks containing wine, oil, honey, or other liquids, have leaked to such an extent as to be empty, or nearly empty, such casks may be abandoned for freight.

Art. 124 (79). The captain may not retain the goods on board his ship in default of payment of his freight.

He may, at the discharge, insist upon their deposit with a third party until the payment of his freight.

Art. 125 (80). The captain has a preferential claim for his freight, and for reimbursement of average if there is occasion, on the goods of the cargo for fifteen days after delivery if they have not passed into third hands.

Art. 130 (85). If the ship is stopped in the course of her voyage by a *vis major*, no freight is due for the period of her detention if she is freighted at a fixed price by time, nor any increase of freight if she is freighted by the voyage.

The board and wages of the

l'équipage pendant la détention du navire sont réputés avaries.

Art. 134 (89). Le chargeur qui retire ses marchandises pendant le voyage est tenu de payer le fret en entier et tous les frais de déplacement occasionnés par le déchargement; si les marchandises sont retirées pour cause des faits ou des fautes du capitaine, celui-ci est responsable de tous les frais.

Art. 138 (93). Le fret est dû pour les marchandises que le capitaine a été contraint de vendre pour subvenir aux victuailles, radoub et autres nécessités pressantes du navire, en tenant par lui compte de leur valeur, au prix que le reste, ou autre pareille marchandise de même qualité, sera vendu au lieu de la décharge, si le navire arrive à bon port.

Si le navire se perd, le capitaine tiendra compte des marchandises sur le pied qu'il les aura vendues, en retenant également le fret porté aux connaissements, sauf dans ces deux cas, le droit réservé aux propriétaires du navire par le § 2 de l'article 46.

Art. 139 (94). Si le capitaine est contraint de faire radoubier le navire pendant le voyage, l'affrètement est tenu d'attendre ou de payer le fret en entier.

Dans le cas où le navire ne pourrait être radoubé, le capitaine est tenu d'en louer un autre.

Si le capitaine n'a pu louer un

crew during the detention of the ship are accounted average.

Art. 134 (89). The shipper who withdraws his goods during the voyage is bound to pay the full freight and all expenses of the displacement (of other goods) occasioned by the discharge; if the goods are withdrawn owing to the acts or faults of the captain, the latter is responsible for all the expenses.

Art. 138 (93). Freight is due for goods which the captain has been obliged to sell in order to pay for provisions, repairs, and other pressing necessities of the ship, he accounting for their value at the price which the rest or other similar goods of the same quality will sell for at the place of discharge, if the ship arrives there.

If the ship is lost, the captain shall account for the goods according to the sum he sold them for, he retaining also the freight named in the bills of lading, saving in both cases the right reserved to shipowners by § 2 of Art. 46.

Art. 139 (94). If the captain is obliged to repair the ship during the voyage, the freighter is bound to wait or to pay the freight in full.

In case the ship cannot be repaired, the captain is bound to hire another.

If the captain has not been able

autre navire, le fret est réglé ainsi qu'il en est dit en l'art. 142.

Art. 141 (96). Le capitaine est payé du fret des marchandises jetées à la mer pour le salut commun, à la charge de contribution.

Art. 142 (97). Il n'est dû aucun fret pour les marchandises perdues par naufrage ou échouement, pillées par des pirates ou prises par les ennemis.

Le capitaine est tenu de restituer le fret qui lui aura été avancé, s'il n'y a convention contraire.

Il n'est dû aucun fret pour les marchandises qui, après naufrage ou déclaration d'innavigabilité du navire, ne seront pas parvenues à destination.

Si les marchandises parviennent à destination à un fret moindre que celui qui avait été convenu avec le capitaine du navire naufragé ou déclaré innavigable, la différence en moins entre les deux frets doit être payée à ce capitaine. Mais il ne lui est rien dû si le nouveau fret est égal à celui qui avait été convenu avec lui; et, si le nouveau fret est supérieur, la différence en plus est supportée par le chargeur.

Art. 143 (98). Le capitaine qui a concouru au sauvetage ou au rachat des marchandises non parvenues à destination a droit à une indemnité, qui, en cas de contestation, est réglée par les tribunaux.

to hire another ship, the freight is regulated according to Art. 142.

Art. 141 (96). The captain is paid the freight on goods jettisoned for the common safety, and it is contributed for in general average.

Art. 142 (97). No freight is due for goods lost by shipwreck or stranding, pillaged by pirates, or taken by the enemy.

The captain is bound to refund freight that has been advanced, unless there is a stipulation to the contrary.

No freight is due for goods which, after shipwreck or a declaration of the ship's innavigability, have not reached their destination.

If the goods reach their destination at a freight less than that agreed upon with the captain of the ship which is wrecked or declared innavigable, the difference between the two freights must be paid to the said captain. But nothing is due to him if the new freight is of equal amount to the one he agreed for himself; and if the new freight is higher, the excess is to be borne by the shipper.

Art. 143 (98). The captain who has co-operated in the salvage or ransom of goods which do not reach their destination, can claim compensation, to be adjusted in court, in case of dispute.

TITRE V.

DU CONTRAT A LA GROSSE.

Art. 188 (165). En cas de naufrage le paiement des sommes empruntées à la grosse est réduit à la valeur des choses sauvées et affectées au contrat, déduction faite des frais de sauvetage.

Art. 189 (166). En cas de jet de la chose affectée à l'emprunt, la somme payée par contribution est affectée par privilège aux droits du prêteur à la grosse.

Art. 190 (167). Le prêt à la grosse ne contribue pas aux avaries particulières des choses affectées.

Il contribue aux avaries communes survenues postérieurement au prêt, si l'acte n'exprime que le prêteur en est affranchi.

TITRE IX.

DES BATEAUX.

Art. 260. Sont considérés comme bateaux pour l'application de la présente loi, les bâtiments qui font ou sont destinés à faire habituellement dans les eaux territoriales, le transport des personnes ou des choses, la pêche, le remorquage, le dragage ou toute autre opération.

Sont assimilés aux bateaux, pour l'application de la présente loi, tous les bâtiments de moins

TITLE V.

OF BOTTOMRY.

Art. 188 (165). In case of shipwreck, the repayment of the sums borrowed on bottomry is limited to the value of the things saved which were included in the security, after deduction of salvage expenses.

Art. 189 (166). In case of the jettison of the thing bottomried, the amount paid by general average contribution is subject to the preferential claim of the lender on bottomry.

Art. 190 (167). The bottomry loan does not contribute to particular average. The lender contributes to general average occurring after the loan, if the terms of the bond do not expressly exonerate him.

TITLE IX.

OF BOATS.

Art. 260. The craft which are used or intended to be used in territorial waters for the carriage of persons or goods, for fishing, towing, dredging or any other operations are deemed to be boats within the meaning of this law.

For the purposes of this law, all vessels of less than 25 tons burden, which are habitually employed at

de 25 tonneaux de jauge qui font habituellement en mer semblables opérations.

Art. 261. Les dispositions du titre Ier du livre II du présent code sont applicables aux bateaux.

Art. 262. Les dispositions du chapitre Ier du titre II de ce livre et celles des articles 58 et 67 du chapitre II (1) sont applicables à la navigation intérieure.

Art. 263. Le contrat de transport par navigation intérieure est régi par les articles 3, 4, 5, 7, 8 et 9 de la loi du 25 août 1891 (*sur le contrat de transport*) en tant qu'il n'y est point dérogé par les dispositions du présent titre.

Il se constate par tous moyens de droit et notamment par le connaissance.

Le connaissance est signé par le batelier. Il est fait en trois exemplaires: un pour le batelier, un pour l'expéditeur et un pour le destinataire.

Les articles 85, 86, alinéas 3, 4 et 5, 87, 89, 90 et 91 (2) du présent livre sont applicables au connaissance.

Art. 264. Le chapitre III du titre III relatif aux avaries et à leur règlement est applicable aux bateaux, à l'exception de l'article 154.

sea for the same operations are deemed to be boats.

Art. 261. The provisions of Title I. of Book II. of this Code are applicable to boats.

Art. 262. The provisions of Chap. I. of Title II. of this Book and those of Arts. 58 and 67 of Chap. II. (1) are applicable to inland navigation.

Art. 263. The contract of carriage by inland navigation is regulated by Arts. 3, 4, 5, 7, 8 and 9 of the Law of the 25th August, 1891 (*On the Contract of Carriage*), so far as the provisions of this title are not inconsistent therewith.

It is proved by every kind of legal evidence, and in particular by the bill of lading.

The bill of lading is signed by the boatman. It is made in three parts, one for the boatman, one for the shipper and one for the consignee.

Arts. 85, 86, paragraphs 3, 4 and 5, 87, 89, 90 and 91 (2) of this Book are applicable to the bill of lading.

Art. 264. Chap. III. of Title III. relating to averages and their adjustment is applicable to boats with the exception of Art. 154.

APPENDIX F.

THE LAW OF BRAZIL.

The following are the provisions of the Brazilian Commercial Code of 1850, relating to general average:—

TIT. XIII.

OF AVERAGE.

*CHAPTER I.—OF THE NATURE AND CLASSIFICATION
OF AVERAGES.*

Art. 761. All extraordinary expenses incurred for the benefit of the ship or cargo, jointly or separately, and all damage happening to the one or the other, from the loading and departure until the return and unloading are considered averages.

Art. 762. Unless the parties have made a special agreement in the charterparty or bill of lading, averages must be classified and regulated by the provisions of this Code.

Art. 763. Averages are of two kinds: general or common average and simple or particular average. The amount of the former is divided proportionately between the ship, freight and cargo; that of the latter is borne either by the ship alone, or by the thing alone which has suffered the damage or caused the expense.

Art. 764. The following are general average:—

1. Anything given to an enemy, corsair, or pirate, by way of composition, or as ransom for ship and cargo, jointly or separately.
2. Things jettisoned for the common safety.
3. Cables, masts, sails and other apparel cut away or parted by press of sail to save the ship and cargo.
4. Anchors, cables and other objects abandoned for the common safety or benefit.
5. Damage caused by the jettison to the goods remaining on board.
6. Damage caused intentionally to the ship to facilitate the clearing out of water, and damage sustained by the cargo from this cause.

7. The medical treatment, maintenance and compensation of members of the crew, wounded or maimed in defending the ship.

8. The compensation or ransom of members of the crew sent to sea or ashore in the service of the ship and cargo, and on that occasion imprisoned or detained.

9. The wages and board of the crew during delay in a port of refuge.

10. The pilotage and other dues for entering and leaving a port of refuge.

11. The rent of warehouses for the deposit at a port of refuge of goods which cannot be kept on board during the repair of the ship.

12. The expenses of reclaiming the ship and cargo incurred by the captain in a single application for the two jointly, and the board and wages of the crew during such reclamation, provided that the ship and cargo are released and restored.

13. The cost of discharging and expense of lightening the ship in order to enter a harbour or roadstead, when the ship is obliged to do so by storm or an enemy's pursuit, and the damage sustained by the goods by discharging them and reloading them in the ship.

14. Damage suffered in the hull and keel of a ship from being voluntarily stranded to prevent loss or capture by an enemy.

15. Expenses incurred in floating a stranded ship, and all rewards for extraordinary services rendered to prevent her total loss or capture.

16. Loss or damage suffered by the goods placed in lighters or boats in consequence of peril.

17. The wages and board of the crew, if the ship is obliged after the commencement of the voyage to suspend it by order of a foreign Power, or by the outbreak of war; this for all the time that the ship and cargo are detained.

18. Premium on a bottomry loan, raised to cover costs belonging to general average.

19. Insurance premium for general average expenses, and losses caused by the sale of part of the cargo at a port of refuge, to meet the said expenses.

20. Judicial costs for adjusting and distributing the general average.

21. Expenses of an extraordinary quarantine.

And in general losses caused voluntarily, in case of peril or unforeseen disaster, and suffered as immediate consequences of such measures, as well as expenses incurred under the like circumstances, after deliberation, for the common good and safety of the ship and merchandise, from the loading and departure until the arrival and discharge.

Art. 765. Expenses occasioned by the inherent defect of the ship, or by the fault or neglect of the captain or crew shall not be deemed

general average, although incurred voluntarily and after deliberation for the good of the ship and cargo. All the expenses must be borne by the captain or ship (Art. 565).

Art. 766. The following are simple and particular average:—

1. Loss or damage of goods by storm, capture, shipwreck, or accidental stranding, during the voyage, and the expenses incurred to save them.

2. The loss of cables, hawsers, anchors, sails and masts, caused by a storm or other accident of the sea.

3. The expenses of reclamation, when the ship and goods are reclaimed separately.

4. The particular repair of packages, and expenses incurred in preserving damaged goods.

5. The increased freight and expenses of loading and discharging when, the ship having been declared innavigable, the goods are carried to the place of their destination by one or more ships.

In general, expenses incurred by the ship alone or the cargo alone during the time of the risk.

Art. 767. If by reason of shoals or sandbanks the ship cannot start from her port of departure with her whole cargo on board, or cannot reach her port of destination without discharging part of it into lighters, the expenses of lightening are not considered average, but fall on the ship alone, unless the contrary be stipulated in the charterparty or bill of lading.

Art. 768. Similarly pilotage on the coasts and bars and other expenses of entering and leaving harbours and rivers, permits, visits, tonnage, beaconage, anchorage and other navigation dues are not average, but ordinary expenses to be borne by the ship.

Art. 769. When it is necessary to jettison part of the cargo, the first to be jettisoned should be the merchandise and articles stowed on deck (*em cima do consuz*); after these the most heavy and least valuable should be jettisoned, and in case of equality, those which are stowed under hatches (*na coberta*) and are most accessible. The utmost possible care should be taken to note the marks and numbers of the packages jettisoned.

Art. 770. Following the consultation held with regard to the jettison (Art. 509), a detailed statement shall be drawn up of the jettisoned goods; and if by reason of the jettison any damage was done to the ship or the rest of the cargo, mention shall also be made of this accident.

Art. 771. The losses which the goods sustain when put into lighters in the ordinary course of transport, or to lighten the ship in case

of danger, shall be adjusted in conformity with the provisions of this chapter applicable to them, according to the different causes from which the loss resulted.

*CHAPTER 2.—OF THE LIQUIDATION, DIVISION AND
CONTRIBUTION OF GENERAL AVERAGE.*

Art. 772. Before damage, sustained by the ship or cargo, can be considered average to be charged to the insurer, it must be examined by two skilled arbitrators, who shall declare—(1) the cause of the damage; (2) what part of the cargo has been damaged and by what cause, stating its marks, numbers or packages; (3) in case of the ship or its appurtenances, what is the value of the damaged articles and what it will cost to repair or replace them.

All these formalities, examinations and surveys shall be directed by the judge of the particular district, and carried out after citation of the interested parties; either personally or by their representatives; and the judge has power, in the absence of the parties, to nominate officially an intelligent and fit person to represent them (Art. 618).

The formalities, examinations and surveys as regards the hull of the ship and its appurtenances should, whenever possible, be carried out before the repairs are begun.

Art. 773. Damaged goods shall always be sold by public auction to the highest bidder, and paid for on delivery; and the same course shall be taken with the ship when she has to be sold according to the provisions of this Code. In such cases the judge, if it seems to him convenient, or if any interested party requires it, may order that the hull or any of its appurtenances shall be sold separately.

Art. 774. The estimate of the loss for allowance in general average should be based on the difference between the gross sound and damaged values of the goods for cash at time of delivery; in no case should the net value be adopted, nor that which might be obtained by delaying the sale or by offering credit.

Art. 775. If the owner or consignee does not wish to sell the sound portion of his goods, he cannot be compelled to do so. In that event, the value for the calculation of the allowance will be the current price which the goods, if sold at the time of delivery, would have realised in the market, as indicated by the prices current at the place of delivery, or in the absence of these, as certified to, under oath, by two accredited merchants dealing in similar goods.

Art. 783. The adjustment and apportionment of the general average

shall be made by arbitrators appointed by both parties at the instance of the captain.

In the event of the parties not being willing to act, the arbitrators shall be appointed either by the Tribunal of Commerce, or, in those cases where the port is distant from the Tribunal, by the commercial judge in whose jurisdiction the matter falls.

If the captain should fail to arrange for the adjustment of the general average, any interested party may immediately take the necessary steps for this purpose.

Art. 784. The captain has the right to demand, before opening the ship's hatches, that the consignees of the cargo shall give proper security for the payment of the general average, for which their respective goods are liable as their share of the general contribution.

Art. 785. If the consignees refuse to give the security demanded, the captain may require the judicial deposit of the goods liable to contribute, until he is paid, the proceeds of their sale being subjected to the payment of the general average, as soon as the distribution takes place.

Art. 786. The adjustment and distribution of the general average shall be made at the port of delivery of the cargo. Nevertheless when, on account of damage sustained after sailing, the ship has been obliged to return to the port of loading, the necessary expenses of repairing the general average damage may be adjusted there.

Art. 787. When the general average is adjusted at the port where the cargo is delivered, the following interests must contribute:—

1. The cargo, including specie, silver, gold, precious stones and all other valuables on board.
2. The ship and appurtenances on their actual value at the port of discharge.
3. The freight, on half its value.

The provisions on board for the supply of the ship, the effects of the captain, crew and passengers for their personal use, and the objects brought up from the sea by divers at the expense of the owner do not contribute.

Art. 788. When the adjustment is made at the port of loading, the value of the cargo shall be estimated from the invoices, adding to the cost price the expenses incurred up to the time of shipment. The ship and freight shall contribute on the basis established by Art. 787.

Art. 789. Whether the adjustment is made at the port of loading or discharge, the expenditures which are made good by way of contribution contribute to general average.

Art. 790. Articles carried on deck and those which have been loaded without bills of lading, signed by the captain, and those which their owner or his representative, on the occasion of a sea peril, has moved from the place where they were stowed, without the captain's leave, shall contribute on their respective values when they arrive in safety; but the owner, in the converse case, is not entitled to a reciprocal indemnity.

Art. 791. Except in the cases dealt with in Arts. 651 and 764, Nos. 12 and 19, the owner of an interest sacrificed by a general average act cannot claim contribution from the interests saved, if these by some accident do not come into the possession of the owners or consignees, or if coming into their possession, they have no value.

Art. 792. If, in the event of a jettison, the vessel is saved from the peril which gave rise to the general average act, but is subsequently lost on the voyage, the goods saved from the wreck shall contribute in general average to the loss of those which were jettisoned at the time of the first peril.

If the vessel is lost as a result of the first named peril, but part of the cargo is saved, the latter does not contribute towards the goods jettisoned on the occasion of the disaster which caused the wreck.

Art. 793. The decree which confirms the apportionment of the general average and the consequent liability of the various contributing interests, is enforceable at law, and can be enforced immediately, although it may be appealed against.

Art. 794. If after the contributions have been paid, the owners of the goods made good in general average should recover the same, they must return the net value of the goods saved, *pro rata*, to all who contributed. If, however, these goods were not taken into account in the apportionment of the general average, the owners are not obliged to bring into contribution the value of such goods recovered after completion of the apportionment.

APPENDIX G.

THE LAW OF CHILI.

The Chilian Commercial Code was enacted in 1865, and came into force in 1867. The following are its provisions which relate to general average:—

TITLE V.

OF RISKS AND DAMAGE DURING MARITIME TRANSPORT.

Section 1.—Definitions and General Rules.

Art. 1084. The following are considered average in the legal sense of the word:—

1. All damage which the vessel suffers, loaded or in ballast, before sailing, during the voyage, or after she has been anchored at the port of destination, and also the damage, which the goods may have suffered from the time they are loaded in lighters or other small boats at the place of shipment until they are unloaded at the place of destination to which they are consigned.

2. All extraordinary and unforeseen expenses incurred during the voyage for the preservation of the vessel, of the cargo, or of both.

Art. 1085. In ordinary cases the following are not considered average:—

1. Coast and port pilotage.

2. Expenses of lighters and tugs.

3. Port dues.

4. Expenses of lightening a vessel which, owing to want of water, is unable to sail, or to enter its port of destination, with all its cargo.

5. In general, all ordinary expenses of navigation.

The shipowner is solely responsible for all the expenses stated, unless it is stipulated otherwise in the charterparties or bills of lading.

Art. 1086. Unless special arrangements have been made, the responsibility for, and the liquidation and payment of the average shall be decided in accordance with the provisions of this Title.

Art. 1087. For the adjustment of average made outside the territory of the Republic the laws and customs of the place where the average has been proved shall be observed.

Art. 1088. Average is gross or general, simple or particular.

Section 2.—Of General Average, Adjustment of Average, and Jettison.

Art. 1089. General average includes not only damage caused in pursuance of a resolution taken before or after the ship has commenced its voyage, to the ship and its cargo, conjointly or separately, in order to save them from imminent sea risk, but also such damage as is a direct and inevitable consequence of the sacrifice, and the unforeseen expenses incurred for the general benefit at the time and in the form indicated.

Art. 1090. The following are deemed to be general average:—

1. The delivery of anything to enemies or pirates as composition and ransom for the vessel, the cargo, or both conjointly.

2. The wages and expenses of the hostages during their detention until their return to the vessel or to their domicile.

3. The expenses incurred for claiming conjointly the restoration of the vessel and cargo which have been captured, and also the maintenance of the captain, officers and crew during the time they are detained, including wages and food.

4. The damage which the vessel or the cargo may have suffered in the defence against enemies or pirates, the loss of ammunition consumed during the combat, and the rewards promised or given to the crew for the purpose of stimulating their courage.

5. The medical expenses and maintenance of and allowances to the crew and passengers, wounded, maimed or crippled whilst defending the vessel or in the ship's service during the combat, and the wages of the former until they are completely restored to health.

6. The wages, maintenance and ransom of the crew, who have been captured or detained and who are in the service of the vessel either on land or on sea.

7. The wages and maintenance of the crew for the time during which the vessel is waiting for a convoy, or remains in a neutral port on account of a well-founded fear of enemies or pirates, or owing to the port of destination being blockaded.

8. The loss of things thrown into the sea to lighten the ship, whether

they belong to the ship, the cargo or the crew, and the damage which the jettison causes to the things remaining on board.

9. The intentional cutting or rendering useless of the masts, yards, cables, sails or other appurtenances of the vessel.

10. The voluntary abandonment of the anchors, boats, launches and other appurtenances to save the ship from collision or from any other sea risk.

11. The damage caused by carrying a press of sail in order to save the vessel and cargo from imminent danger.

12. The damage caused intentionally to the vessel for the purpose of extinguishing fire or to facilitate the draining of water, the jettison, the lightening or extrication of the cargo, and also the damage caused in consequence of these operations.

13. The expenses of lightening or transshipping a part of the cargo for the purpose of reaching a port which is not the port of destination of the vessel, in order to save it from the attacks of enemies or pirates, or from a storm or any other sea risk, and the loss of the goods which have been unloaded or transhipped, or the damage which has been caused to the goods during the unloading, transshipment or reshipment of the same.

14. The wages and maintenance of the crew in cases where the ship has been obliged to put into a port of refuge for the common benefit, but only for the time which was strictly required by the necessity of the case; the dues for entering and leaving the port, expenses of unloading and reloading, and also the rent of the warehouses in which goods are stored which could not remain on board whilst the repairs were being made.

15. The depreciation of goods sold in the case where the ship has been obliged to put into a port of refuge for the purpose of repairing damage caused by an accident which constitutes general average, the maritime profit, the commission on bottomry loans raised to pay the cost of the repairs, and the insurance premiums for these expenses.

16. The damage caused, conjointly or separately, to the ship or cargo, by the voluntary stranding of the ship for the purpose of saving them from a sea risk, and the expenses incurred for re-floating the vessel.

17. The expenses incurred for inspecting, classifying and apportioning the general average.

18. In general, all losses, damage and expenses incurred under the circumstances stated in Article 1089.

Art. 1091. In order to determine the responsibility of the insurer of the vessel and that of the lender on bottomry of the hull and keel, the damage which the vessel sustains, and the expenses incurred,

whilst navigating in ballast shall also be considered as general average, provided they are of the nature indicated in Article 1089.

Art. 1092. The vessel, the freight and the goods which are contained in it at the time when the risk is being run, are responsible for the general average, which is to be paid by contribution from their owners.

Consequently the following contribute to the payment of the general average:—

1. The vessel for its value at the port of discharge.
2. The whole freight which the vessel receives for the passengers, the goods saved and the goods sacrificed for the common benefit, the expenses of the maintenance and wages of the captain and crew being previously deducted.
3. The goods on board, including those which have been carried on the deck (*en el combes*) of the ship, or under cover without the usual bills of lading.
4. The goods sold for the requirements of the vessel, and the amount at which the sacrificed goods are valued.
5. Coined money belonging to the vessel, cargo and passengers, in accordance with the rate of exchange at the place where the voyage ends.

The wages of the captain and the crew also contribute in case of ransom.

Art. 1093. The rule fixed in paragraph 1 of the preceding article is applicable in the event of the vessel or cargo being saved by other means than those intentionally used for saving it.

It is likewise applicable in case the vessel and cargo, after having been saved from one disaster, afterwards perish in another disaster whilst navigating, provided that some of the articles on board during the first disaster are saved.

Art. 1094. The following do not participate in the benefit of the contribution:—

1. Average which does not exceed one hundredth part of the value of the vessel or the cargo to which the sacrificed articles or goods belong.
2. Goods which were shipped without the usual bills of lading.
3. Goods stowed on the deck (*sobre el combes*) of the ship without the unanimous consent of all the persons mentioned in No. 7 of Article 907 (a).

In the latter case the shipowner (*fletante*) (b) will be responsible for

(a) *I.e.*, the shipowner, officers and freighters, but their consent is not required for ships engaged in short coasting voyages.

(b) *Fletante* is defined in Art. 970 as the person who lets the ship and undertakes the transport (of the goods).

the loss or average even when the goods have been placed on the deck of the vessel with the consent of the shipper to whom they belong.

Art. 1095. The goods jettisoned and afterwards recovered will not be included in the adjustment of the average, except for the diminution of value which they have suffered, in addition to the expenses of salving them.

If the amount of these goods has been included in the general average and has been paid to the owners before their recovery has been verified, the said owners must return the contribution which they have received, and can only keep the amount corresponding to the deterioration of the goods plus the salvage expenses.

Art. 1096. The following do not contribute to the reimbursement of general average:—

1. Munitions of war and provisions intended for consumption on board the vessel.
2. The personal effects and clothes of the captain, officers and crew, which have already been used.
3. The personal effects and clothes, which have already been used, belonging to the shippers, supercargoes and passengers, to the amount of the value which is assigned to those which the captain excludes from the contribution.
4. Goods lost in a previous disaster.

Art. 1097. It is for the council of the ship's officers to decide upon the sacrifices and expenses which form general average.

The shippers and their supercargoes shall be invited to the council and shall be heard, so that when they are informed of what has been decided upon, they may protest according to their opinion, but they have no consultative vote.

The resolutions of the majority of the council shall be carried into effect, notwithstanding the opposition of the shippers or supercargoes and on the responsibility of the members who have agreed to it.

In this case the shippers who consider themselves wronged will have the right to claim indemnification from those members of the council who voted for the average from fraud, negligence or ignorance.

If the votes be equally divided the captain will have the casting vote.

Art. 1098. If the imminence of the danger does not allow the captain to obtain the opinion of the ship's officers, or hear the shippers or supercargoes, he can decide alone and on his own responsibility to make the sacrifices or incur the expenses which he considers necessary for the common safety.

He can also act contrary to the resolution of the meeting should he consider it opposed to the common interest, but in this case he alone will be responsible for the damage and losses which his decision may cause.

Art. 1099. If the urgency of the case allows it, the captain shall enter the resolutions of the meeting in the ship's log-book before carrying them into effect.

This entry must state that the shippers and supercargoes present were summoned and heard, and must state the reasons which were decisive for the resolution, and the votes opposed to it with the reasons given by the dissident voters, and it must be signed personally or by proxy by all the persons present at the meeting.

The captain must deposit a certified copy of this entry at the secretary's office of the Chamber of Commerce at the first Chilean port where he arrives within twenty-four hours reckoned from the time when the vessel was admitted to free pratique, and at the same time he must confirm on oath all the facts stated in the same.

If the first port at which the vessel arrives is a foreign port, the presentation and ratification of the entry shall be made before the Chilean Consul, and if there be none, before the authorities mentioned in the second paragraph of No. 17 of Article 905 (c).

Art. 1100. If the shippers and supercargoes present have not been summoned and heard they shall be exempt from contributing to the general average, and the captain will have to pay their respective contributions, except in the case stated in the first paragraph of Article 1098.

Art. 1101. As soon as the danger has disappeared which compelled the captain to decide on his own responsibility on a general average, he must enter and sign in the ship's log-book a statement giving all the particulars of the event, and also state in it the reasons for his decision and those which he had for omitting to summon and hear the opinion of the shippers and supercargoes.

The ship's officers and the owners or agents of the cargo need not sign the report, but if they sign it, they must in due course ratify the contents by a solemn oath.

The report must be presented and ratified by the captain in the form and within the period stated in Article 1099.

Art. 1102. Should the council of the officers or the captain alone decide to throw overboard a part of the cargo, or some of the articles

(c) *I.e.*, before the local authority having cognizance of commercial matters, or if there be none before the ordinary magistrate.

belonging to the vessel, the jettison shall be carried out in the following order:—

1. The goods which are placed on the deck (*sobre el combes*) of the vessel.

2. The articles which are of the least necessity for the service of the crew or ship.

3. The goods which are heaviest and of least value.

4. Those which are on the first deck (*en el primer puente*) and afterwards those of the second deck (*del segundo*), both being of the same class.

This order can be changed by the captain in agreement with the ship's officers, if the conditions of the stowage of the cargo and other circumstances of the case so require.

Art. 1103. After the jettison the captain must make a memorandum, at the foot of the corresponding report, of the goods thrown overboard, and of the damage which the vessel and the remaining cargo have suffered in immediate and direct consequence of this act.

The memorandum shall be signed by the captain and the officers of the vessel and shall be rectified at the time of unloading, should any of the goods thrown overboard not have been mentioned owing to the hurry and confusion of the jettison.

Section 3.—Of the Proof, Regulation and Distribution of the General Average.

Art. 1104. The proof, regulation and distribution of the general average shall be made, at the request of the captain, before the proper court at the unloading port, whether Chilian or foreign, all the interested parties or their agents being properly summoned and heard in accordance with the law.

Should all the interested parties not be present, it shall be sufficient to summon and hear the two principal agents.

If there are no persons who legally represent the absent interested parties, a curator shall be appointed to act for them.

Art. 1105. If the captain does not properly carry out the obligation, which is imposed upon him by the first paragraph of the preceding article, the owner of the vessel, the shippers and any other interested person can invoke the law for the adjustment of the general average, reserving their right to demand indemnification for the damage and losses which the delay causes them.

Art. 1106. The proceedings mentioned in Article 1104 can be taken in the port of shipment in the following cases:—

1. When in the opinion of the Chamber of Commerce it would have been impossible to make the proof, regulation and distribution of the average at the port of discharge.

2. Whenever the jettison takes place at a place near the port of departure, the vessel shall return to it or put into another port near by, and the owner of the goods which have been thrown overboard shall replace them with others of equal class and quality.

Art. 1107. By port of discharge is not only understood the port of destination of the shipment, but also the port at which the largest portion of the cargo, estimated by its value, is unloaded, and that port where the voyage terminates owing to the vessel being innavigable, or to the cancellation or compulsory shortening of the voyage, unless in the first of these three last cases the cargo is carried on in another ship.

Art. 1108. The average shall be proved by means of the protest or report mentioned in Articles 1099 and 1101, and shall be ratified by the persons who have signed the same.

The captain can confirm the contents of the protest by the declaration of the passengers, and failing this by the statement of the crew.

The protest admits of proof to the contrary, and its absence can be remedied by any of the means of proof which this Code sanctions.

Art. 1109. When the captain presents the protest, he must request the appointment of experts, who after having been sworn must be present at, and examine closely, the opening of the hatches, and state in writing what they have observed with regard to the condition of the vessel and the cargo.

Art. 1110. After having considered the proofs given by the interested parties, the Court shall declare the legality or the illegality of the average.

In the former case it shall proceed with the classification of the average and require the interested parties to appoint experts, both for the appraisalment of the vessel, cargo, losses and damage, and for the adjustment and distribution of the general average.

In the second case, it will condemn the captain to pay the damage and losses, according to law.

Art. 1111. After the cargo has been examined and sworn to, the experts and appraisers shall value the lost goods and the damage which the goods saved have suffered.

The value of the lost goods shall be fixed, after deducting the freight, import duties and ordinary expenses, at the market price of other goods of the same class at the port of discharge.

The nature and quality of the lost goods shall be proved by the

bills of lading, and should there be no bills of lading by the invoices and any other legal proof.

The loss and damage caused to the hull and appurtenances of the vessel shall be fixed at the value which the sacrificed articles had at the time of the average.

Art. 1112. The goods saved shall be valued, after having been inspected and examined, at the market price current in the port of discharge, after deducting freight, import duties, ordinary expenses and the particular average which they have suffered during the voyage.

When the adjustment and distribution of the general average have been made in the ship's port of departure, the goods saved shall be valued at the market price at the time when they were put on board, the shipping expenses being added, but not the insurance premium, if any.

In case the voyage has been cancelled or the goods sold in a port which the ship was compelled to enter for the purpose of being supplied with urgent necessities, the value of the goods saved shall be fixed at the market price at the place where the cancellation or the sale took place.

The ship and its appurtenances shall be valued according to the state in which they are found.

Art. 1113. If the goods saved are of a better quality than stated in the bills of lading, they shall contribute to the payment of the average according to their value.

The goods lost shall be contributed for in this case at the price assigned to them according to the quality stated.

If, on the other hand, the quality of the goods saved is inferior to that stated in the bills of lading, they shall contribute according to the value of the quality indicated.

The lost goods shall be contributed for at the market price.

Art. 1114. When the valuation mentioned in Articles 1111 and 1112 has been made, the experts who are responsible for the liquidation and distribution of the general average shall make out three general accounts: the first of the amount to be made good, the second of the contributing assets and the third of the distribution of the average amongst the interested parties.

Art. 1115. The amount to be made good shall include:—

1. The expenses which have been incurred for the general benefit.
2. The total amount of payments which were made during the

voyage or at the port of discharge for replacing articles belonging to the vessel, which were sacrificed for the general benefit.

3. The market price of the lost goods at the port of discharge and the diminution in value of the damaged goods.

4. The freight of the lost goods.

5. The fees of the experts charged with the proof, regulation and distribution of the general average.

The values indicated in item 3 shall be shown in this account as fixed by the expert appraisers.

Art. 1116. The contributing assets shall include:—

1. The market price of the saved, lost and damaged goods at the port of discharge.

2. The value of the articles belonging to the vessel which were sacrificed at the time of the disaster.

3. The value of the vessel and its appurtenances and the whole of the freight, after making the deductions mentioned in No. 2 of Article 1092.

In this account the freight of the goods which were thrown overboard shall not be set out separately.

Art. 1117. In the third account the total amount of the average shall be distributed proportionately amongst the contributors.

Art. 1118. The contributors who have not suffered any general average shall pay the contribution assessed upon them in the distribution account.

Those who have suffered shall set off their credit against their debit until the sum required is reached, and they shall receive or pay the difference.

Art. 1119. All the proceedings in the adjustment shall be laid before the Court for approval, the interested parties or their legal agents having previously been heard.

Art. 1120. The captain shall effect the distribution, and is responsible to the interested parties for all damage and losses which his negligence or delay causes them.

Art. 1121. The contributors shall pay their respective contributions within seventy-two hours, reckoning from the time stated in the notification of the judgment approving the adjustment.

If they do not pay within this time, the captain shall demand the sale of the goods saved until the necessary sum is obtained to cover the unpaid contributions and the costs of execution.

Art. 1122. The captain shall not be obliged to deliver the goods to the contributors until the contribution has been paid, unless the interested party, when he receives them, agrees to a guarantee for the amount of his contribution.

Art. 1123. The owner of the lost or damaged goods has the right to claim the corresponding indemnification immediately from his underwriter, reserving to the latter the right to demand payment from all those who have to contribute to the general average.

APPENDIX H.

THE LAW OF DENMARK.

When the last edition of this work appeared a draft of the proposed Scandinavian Maritime Code had already been prepared, and Mr. Lowndes was able to insert extracts from it. The Code has, since then, been adopted in all three countries concerned. It was sanctioned in Denmark on the 1st of April, 1892, and came into force on the 1st of January, 1893. Both in arrangement and in substance the law, as adopted in Denmark, agrees with the Swedish Law of the 12th June, 1891, a translation of which is printed *infra*, Appendix U. It is, therefore, unnecessary to insert here the Danish text of the Law. The few unimportant differences between the respective versions are pointed out in the notes to the Swedish Law.

The editors have been informed by Mr. Viggo Middelboe, average adjuster, of Copenhagen, that, since the new law came into force there have only been two decisions of the Danish Courts on questions of general average.

The earlier one was a judgment of the Maritime and Commercial Court at Copenhagen, 24th January, 1898. The facts were that a vessel grounded and was got off with the assistance of salvage steamers. A general average statement was made up, and the cargo charged with its share of the general average expenses. The master and first mate were, however, charged with having by their negligence caused the grounding, and were fined Kr. 200 and Kr. 100 respectively in the Supreme Court. One of the cargo-owners thereupon claimed from the shipowners the return of the general average contribution paid by him, and the Court decided in his favour, holding that according to § 191 the shipowners had no right to compensation for damage to the ship caused by an accident for which the master was responsible. The bill of lading contained the clause "vessel not responsible for . . . damage," but Mr. Middelboe states that there was no real negligence clause.

The second decision was also one of the Maritime and Commercial Court at Copenhagen, 30th January, 1908. A vessel had grounded, and the engines had been damaged in the efforts to refloat her. Afterwards she was docked for repairs to her hull and machinery, and the average adjuster, in accordance with practice, charged the whole of the docking expenses to particular average. The Court held, however, that under § 206 part of the docking expenses had to be charged to the damage to the machinery, and so made good in general average.

APPENDIX I.

THE LAW OF FRANCE.

France, as the country to which we owe the laws of Oleron, the Guidon, and the Ordonnance of Louis XIV., not to mention the great commentaries of Valin, Emerigon, and Pothier, and as having thus taken the lead in the principal developments of maritime law in Europe, certainly deserved the foremost place amongst modern systems of general average; though it may well be questioned whether the present Code, having undergone little or no alteration in the matter of general average since the time of the First Napoleon, is not now ripe for revision.

The French law is regulated by the Code de Commerce, of which the passages bearing on the subject are set out in this Appendix. The editors are indebted to M. E. Audouin, Secretary of the Comité des Assureurs Maritimes de Paris, for the notes to the text of the law.

TIT. XI. DES AVARIES.

§ 397. Toutes dépenses extraordinaires faites pour le navire et les marchandises, conjointement ou séparément.

Tout dommage qui arrive au navire et aux marchandises, depuis leur chargement et départ jusqu'à leur retour et déchargement.

sont réputés avaries.

§ 398. A défaut de conventions spéciales entre toutes les parties, les avaries sont réglées conformément aux dispositions ci-après.

TIT. XI. AVERAGE.

§ 397. All extraordinary expenses incurred on account of the ship and the goods, jointly or severally.

All damage which happens to the ship and the goods, from the loading and departure to the arrival and discharge.

are accounted average.

§ 398. In the absence of special stipulations between all the parties, average is to be governed by the following rules (*a*):—

(*a*) An adjustment of general average is indivisible. If, therefore, one portion of the cargo has been carried under a contract incorporating the York-Antwerp rules, and as regards another portion the law of the French port of destination applies,

§ 399. Les avaries sont de deux classes, avaries grosses ou communes, et avaries simples ou particulières.

§ 400. Sont avaries communes,

1. Les choses données par composition et à titre de rachat du navire et des marchandises;

2. Celles qui sont jetées à la mer;

3. Les câbles ou mâts rompus ou coupés;

4. Les ancres et autres effets abandonnés pour le salut commun;

§ 399. Average is of two kinds: gross or general average, and simple or particular average.

§ 400. To general average belong,

1. Things given by way of composition or ransom for the ship and the goods;

2. Those thrown into the sea;

3. Cables or masts broken or cut away (*b*);

4. Anchors and other articles abandoned for the common safety (*c*);

Art. 398 requires the adjustment for the whole cargo to be made in accordance with French law. (Tribunal de Commerce du Havre, 4th June, 1890; Cour d'Aix, 28th January, 1903.)

The parties interested may agree, if they are unanimous, that there shall be no contribution, but that each party shall bear the loss which he has suffered or the expenses which he has incurred for the common benefit. (Cour d'Aix, 1862; Trib. de Com. de Marseille, 13th November, 1883.)

(*b*) General average extends, in this case, not only to the sails and masts cut away or voluntarily destroyed, and to all rigging and tackle they drag with them, but also to the damage they may cause by falling on deck. (Desjardins, *Traité de Droit Commercial Maritime*, vol. 4, No. 989; Lyon-Caen and Renault, *Traité de Droit Maritime*, vol. 2, No. 910; Cauvet, *Traité de l'Assurance Maritime*, vol. 2, p. 119.)

"When a mast falls accidentally, it is generally thrown overboard with its rigging. The mast may have lost its value, but the rigging has retained a very large portion of its value. Often, also, it happens that the tackle in which the mast has got entangled has to be cut away. These things only occur when there is a violent storm raging, so as to break the mast. At such times it is necessary that there shall be no obstruction in the way of handling the ship, and it is impossible to detach the shrouds or rigging to save them, so they must go overboard. That is a sacrifice required for the common safety, because the remaining in a condition in which the ship could not easily be handled, might involve the loss of everything in such perilous weather. Therefore, loss of shrouds and rigging cut away and thrown over are admitted into general average upon their estimated value." (Cauvet, vol. 2, pp. 119, 120.)

(*c*) According to Art. 39 of the Decree of the 12th December, 1860, if the captain has been compelled by a storm or other accident to abandon an anchor, he should, if possible, fasten a buoy-rope or buoy to it, to mark the place where it is to be found.

5. Les dommages occasionnés par le jet aux marchandises restées dans le navire;

6. Les pansement et nourriture des matelots blessés en défendant le navire, les loyer et nourriture des matelots pendant la détention, quand le navire est arrêté en voyage par ordre d'une puissance, et pendant les réparations des dommages volontairement soufferts pour le salut commun, si le navire est affrété au mois;

7. Les frais du déchargement pour alléger le navire et entrer dans un havre ou dans une rivière, quand le navire est contraint de le faire par tempête ou par la poursuite de l'ennemi;

8. Les frais faits pour remettre à flot le navire échoué dans l'intention d'éviter la perte totale ou la prise;

5. Damage occasioned by the jettison to the goods which remain in the ship (*d*);

6. The cost of curing and boarding seamen wounded in defending the ship, the wages and victuals of seamen during the detention, when the ship is arrested on her voyage by State authority, or during the repair of damage voluntarily suffered for the common safety, if the ship is freighted by the month (*e*);

7. The cost of discharging the cargo to lighten the ship and enter a harbour or river, when the ship is compelled to do so by reason of storm or enemy's pursuit (*f*);

8. Expenses incurred to float a ship which has been stranded with the intention of avoiding total loss or capture (*g*);

If he neglects this precaution, he may be precluded from claiming contribution for the loss of the anchor. (Desjardins, vol. 4, No. 988; Trib. de Com. de Marseille, 17th March, 1857.)

(*d*) It is agreed that the same principle applies generally to all damage occasioned, even accidentally, by the jettison to the rest of the cargo or to the ship. Thus if, when the hatches are opened to make the jettison, water penetrates to the hold and damages part of the cargo, the damage is general average. (Trib. de Com. de Marseille, 29th Dec. 1873.) Similarly damage sustained by the bulkheads or bulwarks of the ship in consequence of the jettison is general average. (Desjardins, vol. 4, No. 986; Lyon-Caen and Renault, vol. 2, Nos. 908, 908 (2).)

(*e*) As ships are usually freighted for the voyage, and not by the month, the result is that by the French practice, the wages and victuals of the crew during a detention, however it be caused, are seldom allowed in general average.

(*f*) The same rule applies, under art. 427 (*infra*), to the loss of goods placed in boats to lighten the ship, under the circumstances set out in the text.

(*g*) The damage caused both to ship and cargo by voluntary stranding is general average. (Desjardins, vol. 4, No. 1004; Lyon-Caen and Renault, vol. 2, No. 913.)

For a long time it was considered that by reason of the wording of art. 400 (8), which only mentions voluntary stranding, the cost of refloating a ship stranded accidentally was not general average. Now, however, both the Courts and the text-

Et, en général, les dommages soufferts volontairement et les dépenses faites d'après délibérations motivées, pour le bien et salut commun du navire et des marchandises, depuis leur chargement et départ jusqu'à leur retour et déchargement.

And, in general, damage voluntarily sustained and expenses incurred after express deliberation, for the common good and safety of the ship and cargo, from their loading and departure to their arrival and discharge (*h*).

writers generally take the contrary view, at any rate when in consequence of the stranding the ship and cargo have been placed in a position of danger. (Trib. de Com. de Marseille, 12th May, 1879; Cour d'Aix, 6th Aug. 1893; Lyon-Caen and Renault, vol. 2, No. 925.)

(*h*) The general language of this paragraph shows that the instances of general average contained in the preceding paragraphs are not exhaustive. It is this final provision of Art. 400 which governs the solution of the numerous questions which are not specifically dealt with in the Article; and from it the conclusion has been drawn that by the law of France three conditions are essential to the allowance of a loss or expense as general average. These conditions are the following:—

(1) *Voluntary act of the captain.*

The act is voluntary even when the ship and cargo are in such danger that, without the sacrifice, both would inevitably perish. Otherwise the singular result would follow that contribution would not be allowed in those cases where most of all the sacrifice is justified by the magnitude of the peril. (Cour de Rennes, 28th Dec. 1863.)

Must the voluntary act of the captain necessarily be preceded by a consultation with the crew? The text of this paragraph seems to require it. It is now, however, decided that the preliminary consultation is not an essential condition of general average, but only a means of proof for which other proof can be substituted, *e.g.*, entries in the sea-protest. (Cour de Cassation, 12th June, 1894.)

(2) *Community of interest between the ship and the cargo.*

If, therefore, the measure has been adopted exclusively for the sake of the ship, and only incidentally benefits the cargo, the case is not one of general average. (Trib. de Com. du Havre, 6th March, 1882.)

The community of interest between the ship and the cargo does not cease to exist when, in the course of the voyage, a temporary separation takes place in consequence of the occurrence which caused the general average loss. Thus, the transhipment of the cargo in consequence of a stranding does not, when the contract of affreightment has not been cancelled, release the cargo from the obligation of contributing to the cost of refloating the ship after the transhipment. (Trib. de Com. de Marseille, 6th July, 1905.)

For a long time it was considered that, in addition to a common interest, there had to be an imminent danger before the right to contribution came into existence. This doctrine, however, is no longer accepted; and the weight of authority supports the view that it suffices that the sacrifice was made for the common safety imperilled by an existing danger, even though not an imminent one. (Desjardins, vol. 4, No. 976; Lyon-Caen and Renault, vol. 2, No. 882; Cour d'Aix, 19th Aug. 1874.)

§ 401. Les avaries communes sont supportées par les marchandises et par la moitié du navire et du fret, au marc le franc de la valeur.

§ 402. Le prix des marchandises est établi par leur valeur au lieu du déchargement.

§ 403. Sont avaries particulières,

1. Le dommage arrivé aux marchandises par leur vice propre, par tempête, prise, naufrage ou échouement;

§ 401. General average is borne by the goods and by the half of the ship and of the freight, rateably upon their values (*i*).

§ 402. The value of the goods is determined by their price at the place of discharge (*k*).

§ 403. To particular average belong,

1. Damage sustained by the goods from *vice propre* (*l*), from storm, capture, shipwreck, or stranding (*m*);

(3) *Success.*

This condition is implied in Art. 423, *infra*, which states that "if the jettison does not save the ship, there shall be no contribution." It is not, however, necessary to satisfy this condition that the sacrifice shall have saved both the ship and the cargo. Thus, the sacrifice of the whole ship will be general average if it has saved the whole or even part of the cargo, and *vice versa*. (Desjardins, vol. 4, No. 977; Lyon-Caen and Renault, vol. 2, No. 887.) [See editors' addition to note (*e*), p. 507.]

(*i*) The French Courts are divided on the question whether the shipowner or the cargo-owner is liable to pay the contribution of the freight to general average, when the bill of lading contains a stipulation that the freight is payable in any event (ship lost or not lost), and cannot be recovered back. According to several decisions, the cargo-owner must contribute on the total amount of the freight, as in consequence of the clause in question it is at his risk. (Trib. de Com. de Marseille, 29th Dec. 1897; Cour de Rouen, 18th Ap. 1890.) According to other decisions, even under such a bill of lading the shipowner must contribute in respect of half the freight, the Legislature having intended to make the contribution of the ship and freight an indivisible whole, so that the contributing interests of which it is composed cannot be separated. (Trib. de Com. du Havre, 11th July, 1882; Cour de Bordeaux, 4th Ap. 1892.) The practice of the French average adjusters on this point being also unsettled, this important question was recently submitted to the Cour de Cassation, whose judgment has not yet been delivered.

(*k*) But all the charges must be deducted from the gross value of the goods, which their owner would not have had to pay if they had not been saved, *i.e.*, the landing expenses, customs duties and, on principle (see note (*i*), *supra*), the freight. (Desjardins, vol. 4, No. 1064; Lyon-Caen and Renault, vol. 2, No. 950.)

(*l*) *Vice propre* in goods is an inherent principle of deterioration, *e.g.*, the heating of grain, leakage of liquids, fermentation of fruit. In ships *vice propre* is the result either of age or of the bad quality of the materials. (Desjardins, vol. 4, Nos. 1024, 1025; Lyon-Caen and Renault, vol. 2, No. 989; Cour de Cassation, 18th Oct. 1892.)

(*m*) This only refers to accidental stranding; as regards voluntary stranding, see note (*g*), *supra*:

2. Les frais faits pour les sauver;

3. La perte des câbles, ancres, voiles, mâts, cordages, causée par tempête ou autre accident de mer:

Les dépenses résultant de toutes relâches occasionnées soit par la perte fortuite de ces objets, soit par le besoin d'avitaillement, soit par voie d'eau à réparer.

4. La nourriture et le loyer des matelots pendant la détention quand le navire est arrêté en voyage par ordre d'une puissance, et pendant les réparations qu'on est obligé d'y faire, si le navire est affrété au voyage;

5. La nourriture et le loyer des matelots pendant la quarantaine, que le navire soit loué au voyage ou au mois;

Et, en général, les dépenses faites et le dommage souffert pour le navire seul, ou pour les marchandises seules, depuis leur chargement et départ jusqu'à leur retour et déchargement.

2. Expense incurred in saving them (*n*);

3. The loss of cables, anchors, sails, masts, or cordage, caused by tempest or other accident of the sea;

Expenses resulting from the putting into a port of refuge, if occasioned either by the accidental loss of such articles, or by the need of victualling, or to repair a leak (*o*).

4. The wages and provisions of the crew during the detention, when the ship is arrested on the voyage by any State authority, and during repairs which have to be made there, if the ship is freighted by the voyage:

5. The wages and provisions of the seamen during a quarantine, whether the ship is freighted by the voyage or by the month:

And, in general, expenses incurred for, and damage suffered by, the ship alone, or the goods alone, from their loading and departure to their arrival and discharge (*p*).

(*n*) This only relates to expenses incurred solely to save the goods, *i.e.*, when the ship is lost or deemed to be lost, and there is no longer a community of interest between it and the cargo. (Cour de Cassation, 14th March, 1904.)

(*o*) These expenses are obviously only particular average when the occurrences enumerated in the text (loss of cables, &c., need of victualling, springing a leak), which have made it necessary to put into a port of refuge, have not imperilled the safety of the ship and cargo; otherwise the expenses are general average by virtue of the concluding paragraph of Art. 400. (Lyon-Caen and Renault, vol. 2, No. 920; Cauvet, No. 365 *et seq.*; Cour de Cassation, 10th Aug. 1880, and 29th March, 1892.)

(*p*) It is a principle of general application that a quarantine imposed by the sanitary authority is an incident of navigation, and has none of the essential characteristics of general average. Therefore the shipowner must bear alone the expenses which the quarantine entails. (Trib. de Com. du Havre, 5th Nov. 1889.)

The cargo-owner must bear expenses incurred for the goods alone, *e.g.*, the expense of transhipment, even if the transhipment was prohibited by a clause in the bill of lading. (Trib. de Com. du Havre, 7th Feb. 1893.)

§ 404. Les avaries particulières sont supportées et payées par le propriétaire de la chose qui a essuyé le dommage ou occasionné la dépense.

§ 405. Les dommages arrivés aux marchandises, faute par le capitaine d'avoir bien fermé les ecoutilles, amarré le navire, fourni de bons guindages, et par tous autres accidents provenant de la négligence du capitaine ou de l'équipage, sont également des avaries particulières, supportées par le propriétaire des marchandises, mais pour lesquelles il a son recours contre le capitaine, le navire, et le fret.

§ 406. Les lamanages, touages, pilotages, pour entrer dans les havres ou rivières, ou pour en sortir, les droits de congés, visites, rapports, tonnes, balises, ancrages, et autres droits de navigation, ne sont point avaries; mais ils sont de simples frais à la charge du navire.

TIT. XII. DU JET ET DE LA CONTRIBUTION.

§ 410. Si, par tempête ou par la chasse de l'ennemi, le capitaine se croit obligé, pour le salut du navire, de jeter en mer une partie de son chargement, de couper ses

§ 404. Particular average is borne and paid by the proprietor of the thing which has sustained the damage or occasioned the expense.

§ 405. Damage done to the merchandise in consequence of the master having neglected to close the hatches, to make the ship properly fast, or to provide proper implements for hoisting, and of all other misfortunes caused by carelessness of the master or crew, is particular average, for which the shipper has his recourse against the master, the ship, and the freight (*q*).

§ 406. Coasting and harbour pilotage, or towage, in entering harbours or rivers, or quitting them, dues of entry, clearance, visas, surveys, tonnage or light dues, anchorage, and other dues of navigation, are not average; they are simple expenses at the charge of the ship.

TIT. XII. OF JETTISON AND CONTRIBUTION.

§ 410. If, by reason of storm or enemy's pursuit, the captain deems himself obliged, for the safety of the ship, to cast into the sea a portion of his cargo, to cut away his

(*q*) It has been decided that this provision extends to all damage and expenditures, even though done or incurred for the common safety of ship and cargo, when due to the default of the captain (Cour de Cassation, 16th Nov. 1881, and 6th June, 1882), unless by a special clause in the charter-party or bill of lading the shipowner is exempted from liability for such default. (Cour de Cassation, 12th June, 1894.)

mâts ou d'abandonner ses ancres, il prend l'avis des intéressés au chargement qui se trouvent dans le vaisseau, et des principaux de l'équipage.

S'il y a diversité d'avis, celui du capitaine et des principaux de l'équipage est suivi.

§ 411. Les choses les moins nécessaires, les plus pesantes et de moindre prix, sont jetées les premières, et ensuite les marchandises du premier pont au choix du capitaine, et par l'avis des principaux de l'équipage.

§ 412. Le capitaine est tenu de rédiger par écrit la délibération, aussitôt qu'il en a les moyens.

La délibération exprime, les motifs qui ont déterminé le jet, les objets jetés ou endommagés: elle présente la signature des délibérans, ou les motifs de leur refus de signer: elle est transcrite sur le registre.

masts, or to part with his anchors, he is to take the advice of those interested in the cargo who may be on board, and of the principal persons of his crew.

If there is a difference of opinion, that of the captain and the principal persons of the crew is to be followed (*r*).

§ 411. Those things which are least necessary, heaviest and least costly, are to be thrown over first (*s*), and afterwards the cargo from below deck at the choice of the captain with the advice of the principal persons of the crew.

§ 412. The captain is bound to draw up a written report of the deliberation, as soon as practicable.

This report is to set forth the motives which have determined the jettison, and the articles jettisoned or damaged; and is to be followed by the signatures of those who deliberated, or their reasons for refusing to sign; and must be entered in the ship's log-book.

(*r*) The provisions of Art. 410 must be construed subject to the general principles of the law of general average. Thus it has been held that jettison is not general average if the act was not done for the common safety, *e.g.*, when goods have been thrown overboard which infected other goods in contact with them, but did not in any way endanger the safety of the ship. (Trib. de Com. de Marseille, 20th July, 1882.)

The consultation with the crew, prescribed by this Article, is not obligatory when the urgency of the case renders it impracticable (Trib. de Com. du Havre, 28th May, 1883); on the other hand, when this consultation has taken place, it cannot transform expenses (*e.g.*, of putting into a port of refuge) which have not been incurred for the common safety of ship and cargo, into general average. (Cour de Cassation, 8th June, 1891.)

(*s*) This regulation must be followed as far as possible, but is not rigorously binding. Compliance therewith may be prevented by the confusion due to an imminent peril, or by the circumstances of the case. Thus, the captain cannot be expected to jettison the heaviest goods when they are at the bottom of the hold. (Lyon-Caen and Renault, vol. 2, No. 903.)

§ 413. Au premier port où le navire abordera, le capitaine est tenu, dans les vingt-quatre heures de son arrivée, d'affirmer les faits contenus dans la délibération transcrite sur le registre.

§ 414. L'état des pertes et dommages est fait dans le lieu du déchargement du navire, à la diligence du capitaine et par experts.

Les experts sont nommés par le Tribunal de Commerce, si le déchargement se fait dans un port français. Dans les lieux où il n'y a pas de Tribunal de Commerce, les experts sont nommés par le Juge de Paix. Ils sont nommés par le consul de France, et, à son défaut, par le magistrat du lieu, si le décharge se fait dans un port étranger. Les experts prêtent serment avant d'opérer.

§ 415. Les marchandises jetées sont estimées suivant le prix courant du lieu du déchargement; leur qualité est constatée par la production des connaissements, et des factures s'il y en a.

§ 413. At the first port where the ship shall touch, the captain is bound, within twenty-four hours of his arrival, to make affirmation of the facts contained in the deliberation entered upon the log-book.

§ 414. The statement of the loss and damage is to be made in the place of the ship's discharge, under the care of the captain, and by experts.

The experts are named by the Tribunal of Commerce, if the discharge is made in a French port. In places where there is no Tribunal of Commerce the experts are nominated by the Juge de Paix. If the discharge is made in a foreign port (*t*) they are named by the French consul, and in his absence by the magistrate of the place. The experts are sworn before they commence their work.

§ 415. The goods jettisoned are to be valued according to their market price at the place of discharge (*u*); their quality is to be verified by the production of bills of lading, and of invoices if there are any.

(*t*) When some only of the parties interested in the adjustment of the general average are French, the parties who are not French can obviously not be compelled, except under the terms of a diplomatic convention, to abide by the nomination of the French consul. In this case application must be made to the local magistrate. (Desjardins, vol. 4, No. 965; Lyon-Caen and Renault, vol. 2, No. 970.)

(*u*) No deduction is made on account of freight, but the expense of unloading and the Customs duties are deducted. (Desjardins, vol. 4, No. 1052; Lyon-Caen and Renault, vol. 2, No. 937.) [The reason why no deduction is made on account of freight is that, according to Art. 301 (*infra*, p. 510), the captain receives freight on goods sacrificed. (Lyon-Caen and Renault, *ubi supra*.)—EDITORS.]

§ 416. Les experts nommés en vertu de l'article précédent font la répartition des pertes et dommages. La répartition est rendue exécutoire par l'homologation du tribunal. Dans les ports étrangers, la répartition est rendue exécutoire par le consul de France, ou à son défaut, par tout tribunal compétent sur les lieux.

§ 417. La répartition pour le paiement des pertes et dommages est faite sur les effets jetés et sauvés, et sur moitié du navire et du fret, à proportion de leur valeur au lieu du déchargement.

§ 418. Si la qualité des marchandises a été déguisée par le connaissance, et qu'elles se trouvent d'une plus grande valeur, elles contribuent sur le pied de leur estimation, si elles sont sauvées; elles

§ 416. The experts nominated in virtue of the preceding article make the statement of the losses and averages. The statement is rendered executory by the official confirmation of the tribunal. In foreign ports the statement is rendered executory by the French consul, or, in his absence, by any competent tribunal on the spot.

§ 417. The apportionment for the payment of the loss and damage is to be made upon the goods jettisoned and saved (*x*), and upon the half of the ship (*y*) and of the freight (*z*), in proportion to their values at the place of discharge (*a*).

§ 418. If the quality of the goods has been disguised in the bill of lading, and they possess a greater value, they contribute if they are saved according to their real worth. They are paid for ac-

(*x*) See note (*k*) to Art. 402, *ante*, p. 500, as to the values upon which goods contribute.

(*y*) If the damage to the ship has been repaired in the course of the voyage, the cost of the repairs must be deducted from her value at the place of discharge. (Cour de Rouen, 17th July, 1885.)

(*z*) "The freight, from half of which contribution is drawn, is the gross freight, as agreed on in the charter-parties and bills of lading. It is true that to estimate the actual benefit the shipowner derives from the freight, there should be deducted from it any expenses incurred after the general average, which would diminish the profit resulting from the average. But the Code makes this deduction already with a view to these expenses by dividing the freight, and making only one-half contributory." (Droz. vol. 2, p. 146.)

With respect to the contribution of freight paid in advance, or stipulated as payable in any event, see note (*i*), *supra*. As regards passenger steamers, the passage money ought to be treated in the same way as freight, and therefore made to contribute on one-half of its gross amount. (Lyon-Caen & Renault, vol. 2, No. 956.)

(*a*) Everything which is contributed for in consequence of a general average sacrifice, whether of ship, freight, or cargo, must also contribute. (Desjardins, vol. 4, No. 1061.) Particular average, however, is always deducted from the contributory values. (Cour de Rouen, 18th April, 1890.)

sont payées d'après la qualité désignée par le connaissement, si elles sont perdues. Si les marchandises déclarées sont d'une qualité inférieure à celle qui est indiquée par le connaissement, elles contribuent d'après la qualité indiquée par le connaissement si elles sont sauvées. Elles sont payées sur le pied de leur valeur si elles sont jetées ou endommagées.

§ 419. Les munitions de guerre et de bouche, et les hardes des gens de l'équipage, ne contribuent point au jet; la valeur de celles qui auront été jetées sera payée par contribution sur tous les autres effets.

§ 420. Les effets dont il n'y a pas de connaissement ou déclaration du capitaine, ne sont pas payés s'ils sont jetés; ils contribuent s'ils sont sauvés.

§ 421. Les effets chargés sur le tillac du navire contribuent s'ils sont sauvés.

S'ils sont jetés, ou endommagés par le jet, le propriétaire n'est point admis à former une demande en contribution; il ne peut exercer son recours que contre le capitaine.

cording to the value designated by the bill of lading if they are lost. If the goods show a value inferior to that indicated in the bill of lading, they contribute according to the value indicated in the bill of lading if they are saved. They are paid for according to their value if they are jettisoned or damaged.

§ 419. Ammunition of war, provisions, and the personal effects of the crew, do not contribute to the jettison; but, if jettisoned, their value is to be paid by contribution over all the other property (b).

§ 420. Goods for which there is no bill of lading or declaration by the captain are not to be paid for if jettisoned, but must contribute if saved (c).

§ 421. Goods stowed upon the deck of the ship contribute if they are saved.

If they are jettisoned, or damaged by the jettison, the owner of them is not allowed to make a claim for contribution; his only recourse is against the captain (d).

(b) There is, however, a well-established usage to exempt passengers' baggage from contribution. (Lyon-Caen & Renault, vol. 2, No. 946. See *infra*, p. 517.)

(c) Goods shipped without bill of lading now include parcels and securities carried by post. The general practice, which is hardly justifiable in theory, is to exempt them from contribution, as well as to disallow contribution for their sacrifice.

(d) The text-writers and the Courts agree in laying down the rule that the latter provision of this article does not apply to short coasting voyages. (Desjardins, vol. 4, No. 1022; Cour de Cassation, 25th July, 1892.) On the other hand, there is no exception to the provision in the case of long coasting and oversea voyages, even when the goods have been laden on deck with the express consent of the shipper. (Desjardins, vol. 4, No. 1022.)

§ 422. Il n'y a lieu à contribution pour raison du dommage arrivé au navire, que dans le cas ou le dommage a été fait pour faciliter le jet.

§ 423. Si le jet ne sauve pas le navire, il n'y a lieu à aucune contribution.

Les marchandises sauvées ne sont point tenues du paiement ni du dédommagement de celles qui ont été jetées ou endommagées.

§ 424. Si le jet sauve le navire, et si le navire, en continuant sa route, vient à se perdre,

Les marchandises sauvées contribuent au jet sur le pied de leur valeur en l'état ou ils se trouvent, déduction faite des frais de sauvetage.

§ 422. There is no ground for contribution on account of damage suffered by the ship, except in the case where the damage has been done in order to facilitate the jettison.

§ 423. If the jettison does not save the ship, there shall be no contribution (e).

The goods saved are not liable for the value or for the deterioration of those jettisoned or damaged (f).

§ 424. If the jettison saves the ship, and if the ship, continuing her voyage, is afterwards lost,

The goods saved contribute to the jettison on the footing of their value in the state in which they may be, deduction being made of the cost of salvage (g).

(e) The law lays down in this article, with reference to jettison, a principle of general application to all sacrifices for the common safety, viz., that the sacrifice, in order to give rise to contribution, must have had a successful result. (Desjardins, vol. 4, No. 978; Lyon-Caen & Renault, vol. 2, Nos. 886, 887.)

[On a literal construction of this article, it might be thought that if by reason of the jettison the cargo was saved, though the ship perished, there is no right of contribution. It seems, however, that this construction is not adopted. (See *ante*, p. 500, note (k).) Professors Lyon-Caen and Renault say, with reference to this article: "When the ship has not been saved, it is immaterial that the goods have been saved, if their preservation has been brought about by special efforts or by chance, and not by the jettison which has lightened the ship." And then, after quoting the second paragraph of the article, they add: "This would not hold good if the jettison, though it did not save the ship, contributed to the preservation of part of the cargo. Though the ship be lost, the cargo, at any rate, must contribute." (Lyon-Caen & Renault, vol. 2, No. 887.)—EDITORS.]

(f) See the Editors' addition to note (e), *supra*.

(g) In the case treated of in this article, the property liable to contribute comprises the wreck of the ship estimated at its value after its loss; the freight owing to the shipowner, both in respect of the goods sacrificed and those which have survived the final casualty; the goods sacrificed; and the goods which have ultimately been saved, the latter estimated at their value after the final casualty, deducting the cost of salving them. (Cour de Cassation, 2nd April, 1884.)

§ 425. Les effets jetés ne contribuent en aucun cas au paiement des dommages arrivés depuis le jet aux marchandises sauvées.

Les marchandises ne contribuent point au paiement du navire perdu, ou réduit à l'état d'innavigabilité.

§ 426. Si, en vertu d'une délibération, le navire a été ouvert pour en extraire les marchandises, elles contribuent à la réparation du dommage causé au navire.

§ 427. En cas de perte des marchandises mises dans des barques pour alléger le navire entrant dans un port ou une rivière, la répartition en est faite sur le navire et son chargement en entier.

Si le navire périt avec le reste de son chargement, il n'est fait aucune répartition sur les marchandises mises dans les allégés, quoiqu'elles arrivent à bon port.

§ 428. Dans tous les cas ci-dessus exprimés, le capitaine et l'équipage sont privilégiés sur les marchandises ou le prix en provenant pour le montant de la contribution.

§ 429. Si, depuis la répartition, les effets jetés sont recouvrés par les propriétaires, ils sont tenus de rapporter au capitaine et aux intéressés ce qu'ils ont reçu dans la contribution, déduction faite des

§ 425. The goods jettisoned do not in any case contribute to the payment of damage suffered after the jettison by the goods which are saved.

The goods do not contribute to the payment for a ship which is lost or reduced to a state of innavigability (*h*).

§ 426. If, in virtue of a deliberation, the ship has been cut open in order to take out the goods, these shall contribute to the repair of the damage caused to the ship.

§ 427. In case of the loss of merchandise when placed in boats in order to lighten a ship to enter a port or river, this shall be borne by contribution on the part of the ship and entire cargo.

If the ship perishes with the rest of her cargo, no contribution shall be made by the goods placed in the lighters, though they arrive in good safety.

§ 428. In all the cases above laid down, the captain and crew have a privileged claim (*lien*) on the merchandise or the proceeds of its sale for the amount of its contribution.

§ 429. If, after the apportionment, the goods jettisoned are recovered by their owners, these are bound to refund to the captain and others interested the amount they have received by contribution, de-

(*h*) This provision only refers to subsequent particular average losses sustained by the ship or cargo. The goods previously sacrificed must contribute to subsequent general average losses. (Desjardins, vol. 4, No. 980; Lyon-Caen and Renault, vol. 2, No. 890.)

dommages causés par le jet et des frais de recouvrement.

duction being made for the damage caused by the jettison and the expenses of recovery.

*TIT. VIII. DU FRET OU
NOLIS.*

TIT. VIII. OF FREIGHT.

§ 293. Le chargeur qui retire ses marchandises pendant le voyage, est tenu de payer le fret en entier et tous les frais de déplacement occasionnés par le déchargement: si les marchandises sont retirées pour cause des faits ou des fautes du capitaine, celui-ci est responsable de tous les frais.

§ 293. The shipper who takes back his goods during the voyage, is bound to pay the full freight, and all expenses of displacement occasioned by the discharge; if the goods are taken back by reason of the acts or faults of the captain, the latter is responsible for all the expenses.

§ 296. Si le capitaine est contraint de faire radoubier le navire pendant le voyage, l'affrèteur est tenu d'attendre ou de payer le fret en entier.

§ 296. If the captain is obliged to repair the ship during the voyage, the freighter is bound to wait or to pay the freight in full.

Dans le cas où le navire ne pourrait être radoubé, le capitaine est tenu d'en louer un autre.

In case the ship cannot be repaired, the captain is bound to hire another.

Si le capitaine n'a pu louer un autre navire, le fret n'est dû qu'à proportion de ce que le voyage est avancé.

If the captain cannot hire another ship, freight is only due in proportion as the voyage has been partly performed (*i*).

§ 298. Le fret est dû pour les marchandises que le capitaine a été contraint de vendre pour subvenir aux victuailles, radoub et autres nécessités pressantes du navire, en tenant par lui compte de leur valeur au prix que le reste ou autre pareille marchandise de même

§ 298. The freight is due for the goods which the captain has been obliged to sell in order to pay for provisions, repairs, and other pressing necessities of the ship, he accounting for their value at the price which the rest or other similar goods of the same quality

(*i*) If the captain is obliged, by reason of damage sustained in the course of the voyage, to repair his ship and to sell damaged cargo in consequence of the delay for the repairs, he is not entitled to the full freight, but only to freight in proportion to the distance from the port of loading to the port of refuge. (Cour de Rennes, 25th April, 1880.)

qualité sera vendu au lieu de la décharge, si le navire arrive à bon port.

Si le navire se perd, le capitaine tiendra compte des marchandises sur le pied qu'il les aura vendues, en retenant également le fret porté aux connaissements. . . .

§ 301. Le capitaine est payé du fret des marchandises jetées à la mer pour le salut commun, à la charge de contribution.

§ 302. Il n'est dû aucun fret pour les marchandises perdues par naufrage ou échouement, pillées par des pirates, ou prises par les ennemis.

Le capitaine est tenu de restituer le fret qui lui aura été avancé, s'il n'y a convention contraire.

§ 303. Si le navire et les marchandises sont rachetés, ou si les marchandises sont sauvées du naufrage, le capitaine est payé du fret jusqu'au lieu de la prise ou du naufrage.

Il est payé du fret entier en contribuant au rachat, s'il conduit les marchandises au lieu de leur destination.

will sell for at the place of discharge, if the ship arrives there.

If the ship is lost, the captain shall account for the goods according to the sum they have been sold for, he retaining in this case also the freight named in the bill of lading.

§ 301. The captain is paid the freight on goods thrown into the sea for the common safety, at the charge of contribution.

§ 302. No freight is due for goods lost by shipwreck or stranding, pillaged by pirates, or taken by the enemy.

The captain is bound to refund freight that has been advanced, unless there is a stipulation to the contrary.

§ 303. If the ship and goods are ransomed, or if the goods are saved from shipwreck, the captain is paid freight up to the place of capture or shipwreck.

He is paid the full freight, he contributing to the ransom, if he carries the goods to their place of destination (*k*).

(*k*) Goods which have been submerged at the port of discharge and sold "submerged" by the captain, are deemed to have been saved within the meaning of this article, and the captain is therefore entitled to full freight in respect of them. Cour de Cassation, 13th Feb. 1877.)

When the ship has been wrecked before it reaches the port of discharge, the *pro rata* freight due to the captain for the goods saved from the wreck does not contribute to the salvage expenses—the terms of Art. 303, par. (1), (*supra*), are too explicit to admit of this result. (Trib. de Com. du Havre, 27th Dec. 1887; Trib. de Com. de Dunkerque, 22nd March, 1887; Cour de Cassation, 14th March, 1904.) The text-

§ 304. La contribution pour le rachat se fait sur le prix courant des marchandises au lieu de leur décharge, déduction faite des frais, et sur la moitié du navire et du fret.

Les loyers des matelots n'entrent point en contribution.

§ 306. Le capitaine ne peut retenir les marchandises dans son navire faute de paiement de son fret.

Il peut, dans le temps de la décharge, demander le dépôt en mains tierces jusqu'au paiement de son fret.

§ 310. Le chargeur ne peut abandonner pour le fret les marchandises diminuées de prix, ou détériorées par leur vice propre ou par cas fortuit.

Si toutefois des futailles contenant vin, huile, miel et autres liquides, ont tellement coulé qu'elles soient vides ou presque vides, les dites futailles pourront être abandonnées pour le fret.

§ 330. Les prêteurs à la grosse contribuent, à la décharge des emprunteurs, aux avaries communes. Les avaries simples sont aussi à la charge des prêteurs s'il n'y a convention contraire.

§ 331. S'il y a contrat à la grosse et assurance sur le même navire ou sur le même chargement, le pro-

§ 304. The contribution for the ransom is made on the market price of the goods at the place of discharge, deducting the expenses, and on the half of the ship and freight.

The seamen's wages do not enter into the contribution.

§ 306. The captain may not retain the goods on board his ship in default of payment of his freight.

He may, during the discharge, insist upon their deposit in third hands until the payment of his freight.

§ 310. The freighter cannot abandon for freight goods diminished in price, or deteriorated by their *vice propre* or by accident.

If, however, casks containing wine, oil, honey, or other liquids, have so leaked out as to be empty or nearly empty, such casks may be abandoned for freight.

§ 330. Lenders on bottomry contribute to general average in place of the borrowers. Particular averages are also at the lender's charge if there is no agreement to the contrary.

§ 331. If there is both a bottomry bond and an insurance on the same ship or cargo, the pro-

writers, however, generally hold the contrary opinion. (See A. de Courcy, *Revue Internationale de Droit Maritime*, 1885-86, p. 66 *et seq.*; Lyon-Caen and Renault, vol. 2, No. 772 (2).)

duit des effets sauvés du naufrage est partagé entre le prêteur à la grosse, pour son capital seulement, et l'assureur, pour les sommes assurées, au marc le franc de leur intérêt respectif, sans préjudices des privilèges établis à l'article 191.

ceeds of the effects saved from shipwreck are divided between the lender on bottomry for his capital only, and the underwriter, for the sums insured, proportionately to their interest, without prejudice to the privileges established by § 191.

[§ 191 is a list of the order of debts or claims privileged.]

In addition to the decisions of the French Courts cited in the preceding notes, the following decisions on questions of general average deserve attention.

A. CHARACTER OF THE LOSS.

A loss which initially is particular average (*e.g.*, accidental stranding) cannot become a general average loss, unless a new event, imperilling the ship and cargo, gives it this character (Cour de Rouen, 7th Feb. 1899).

There is no presumption that a loss is general average; the onus of proof is on the party who seeks to have it adjusted as such (Cour de Rouen, 29th Jan. 1896).

It is not sufficient, to change a particular average loss into general average, that a voluntary act has intervened. It is also necessary that this voluntary act shall have been undertaken, in consequence of imminent danger, for the common safety (*Ibid.*).

The question whether a loss sustained at a particular moment by the ship and cargo is particular or general average is essentially one of fact, and must, therefore, be decided by the tribunal which has to determine the facts, whose decision on this point cannot be overruled by the Court of Cassation (Cour de Cassation, 10th Aug. 1880, 18th Oct. 1892).

B. PRINCIPAL KINDS OF GENERAL AVERAGE LOSSES.

(1) *Stranding.*

Damage caused to a ship by accidental stranding is particular average. Damage done in the operation of refloating her is only deemed to be general average when it is possible to separate it from the rest of the damage. The mere conjectures of experts, not corroborated by the sea-protest, do not suffice to establish the separation,

and in case of doubt all the damage to the ship is considered particular average (Trib. de Com. du Havre, 10th July, 1900). See also *ante*, p. 498, note (g).

When an accidental stranding has not placed the ship in a position of danger, the losses which result from the stranding, *e.g.*, damage to her machinery in the course of refloating her and the cost of getting her off, are particular average (Cour de Douai, 11th July, 1900).

(2) *Salvage and Towage Expenses.*

A steamship which in consequence of the breaking of her crank-shaft is being navigated under inadequate sails, in bad weather and in the vicinity of the land, is in a position of great danger. Consequently, if the captain accepts the services of another ship to tow her into safety at a port of refuge, the towage expenses must be treated as general average (Cour d'Aix, 4th Dec. 1901).

(3) *Port of Refuge Expenses.*

When a ship puts into a port of refuge solely to repair damage and give some rest to the crew, fatigued by prolonged labour at the pumps, the port of refuge expenses cannot be treated as general average, if there has never been an imminent or even proximate danger of loss (Trib. de Com. du Havre, 11th June, 1895). On the other hand, port of refuge expenses are general average when the ship has put into the port for the preservation of the ship, crew and cargo, in consequence of a leak which it was impossible to stop, and of bad weather which has rendered the position of the ship one of danger (Cour de Rouen, 14th Feb. 1900). So also, the expenses are general average where the ship has put into the port for medical attendance for seamen suffering from scurvy, only three sailors and three boys out of a crew of twenty-three being free from the disease, and even they being in danger of contracting it, so that the captain could not, without great risk, undertake a winter voyage across the Atlantic (Cour de Cassation, 18th June, 1894).

(4) *Press of Sail or Steam.*

Damage done by carrying a press of sail, or by working engines under press of steam (*forcement de vapeur*) to keep off the land or a reef for the preservation of the ship and cargo is general average (Trib. de Com. de Marseille, 2nd May, 1879, and 13th March, 1884; Cour de Rouen, 28th Dec. 1874) (1).

[(1) Apparently the view taken by the French Courts on this question has undergone a change. There are former decisions that damage done to a ship by carrying a press

(5) *Fire on Board.*

Damage caused by the flames when a fire has arisen on board is obviously particular average; but damage caused to the ship or cargo by water poured in to extinguish the fire, or by other measures taken for this purpose, is general average (Trib. de Com. du Havre, 21st Oct. 1889); and this is so even in the case of goods already touched by fire, the practice to this effect prevailing in the French ports being only an application of the Code of Commerce (Trib. de Com. de Marseille, 10th June, 1902; Cour d'Aix, 28th Jan. 1903).

(6) *Use of Cargo and Materials for Fuel.*

The use of the ship's hatches, planks or timbers, or of part of the cargo, for fuel, to enable the ship delayed by bad weather to reach its port of destination is a loss which the shipowner must bear when it results from the fault of the captain in taking an insufficient supply of coal on board, notwithstanding the expectation of a contrary monsoon; or when it results from the fault of the shipowner, who in making a contract of affreightment for a ship whose bunkers are insufficient for the duration of the voyage, has omitted to reserve, in addition to the bunkers, the space necessary for a sufficient supply of coal (Cour de Cassation, 17th May, 1893). When, on the other hand, neither the captain nor the owner has been in fault, and the supply of fuel, adequate for a normal voyage, has been exhausted in consequence of a delay due to exceptionally bad weather, the consequent use of other articles as fuel is treated as a general average loss (Trib. de Com. de Marseille, 1st Dec. 1874, and 2nd May, 1888).

(7) *Expenses and Damage due to Ice-breaking.*

These losses are general average when they are incurred by the captain to extricate the ship from a position of danger, and particular average if his only object is to accelerate the voyage (Trib. de Com. de Marseille, 1st June, 1880; Cour d'Aix, 5th Dec. 1898).

C. ADJUSTMENT OF GENERAL AVERAGE AND LEGAL PROCEDURE.

An action brought to obtain a settlement of general average, being in the nature of a real action, ought to be instituted in the tribunal

of sail is not general average. (See an old decision of the Court of Rennes, cited in Arnould, vol. 2, § 934, and a decision of the Court of Douai, cited in Appendix C. of the last edition of this work, p. 376.) In the statement of the practice of adjusting averages at the time of that edition, it was said (*ibid.* p. 378), that "damage done by carrying a press of sail is admitted in principle to be general average, but the practice is to restrict this admission within as narrow limits as possible."—EDITORS.]

of the port of destination, when the discharge takes place in a French port, unless this course is proved to be impossible. This rule of procedure is not a rule of public policy (*n'est pas d'ordre public*); but in order to oust the jurisdiction the assent of all the parties interested is essential (Cour de Bordeaux, 23rd Nov. 1885; Trib. de Com. de Marseille, 21st July, 1897).

A party is not bound by a settlement of general average if he has not been regularly cited (Trib. de Com. de Marseille, 22nd Dec. 1897):

An action by the captain for a settlement of general average is not maintainable, unless it has been instituted within a month from the date of the protest made in pursuance of Art. 435 of the Code of Commerce (Cour de Cassation, 26th Oct. 1892).

In addition to the notes on French law and practice already inserted, M. Audouin has kindly supplied answers to the following questions submitted to him by the editors:—

Question 1.—When a ship has stranded accidentally and the engines have been worked to refloat her, is

(a) damage done to the engines,

(b) the value of the coal and engine-room stores consumed in the attempt to refloat her,

allowed in general average?

Answer.—Both (a) and (b) are allowed.

Question 2.—When a ship has stranded accidentally, and for the purpose of refloating her a series of operations has been undertaken, such as the discharge of the cargo at different times into lighters, towage, &c., is the whole series of operations considered one continuous general average act, from the time when the first measure is begun until the ship is finally refloated with part of her cargo on board?

Answer.—Yes.

Question 3.—If the cargo is justifiably sold at a port of refuge to defray general average expenses, how is the loss (if any) resulting from this sale treated?

Answer.—It must be treated as general average.

Question 4.—Is there any established custom with regard to the coal and engine-room stores consumed while the ship is bearing up for a port of refuge and returning to the point of deviation from her course?

Answer.—Not as yet, as shipowners, as far as we know, have never thought of claiming contribution in general average for these expenses. But if such a claim were ever made, in our opinion it ought to be dealt with by the application of the last paragraph of Art. 400 of the Code of Commerce (“and in general . . . the expenses incurred . . . for the common good and safety of the ship and cargo”).

Question 5.—When a ship puts into a port of refuge on account of general or particular average, are all the port of refuge expenses allowed in general average, including those of entering and leaving the port, the cost of unloading and reloading the cargo, warehousing charges and insurance of the cargo unloaded?

Answer.—Yes, with this qualification, that if the ship puts into the port of refuge on account of particular average, the damage must be such as imperils both the ship and cargo, as port of refuge expenses can only be allowed in general average, when the ship has put into the port for the common safety. Of course, under the provision of Art. 403 (4) the wages and maintenance are excepted from this rule, when, as the more usual case, the ship has been chartered for the voyage.

Question 6.—Is damage caused to the cargo by its forced discharge at the port of refuge allowed in general average?

Answer.—Yes, when proof is given that the damage was the direct and immediate consequence of the forced discharge.

Question 7.—Is damage suffered by the cargo in the warehouse where it has been stored after its discharge at the port of refuge allowed in general average?

Answer.—Yes, subject to the condition mentioned in the preceding answer.

Question 8.—When, in the performance of a charterparty, a ship is proceeding in ballast to a port of loading, and sacrifices are made or expenses incurred in the nature of general average, does the loss fall entirely on the ship, or must the freight to be earned under the charterparty (freight saved by the general average act) also contribute?

Answer.—The expenses must be divided between the ship and the freight, on the basis of their respective values.

Question 9.—What deductions are made, for the difference between old and new, from the cost of replacement or repairs, when a ship has suffered a general average loss?

Answer.—In the absence of a legal provision on this point, usage for more than a century has established a deduction of one-third of the value as new of ship's materials made of wood, and a deduction of one-sixth in respect of articles made of iron, *e.g.*, chains and anchors. An exception is made when the ship is on her first voyage, in which case no deduction is allowed. But this deduction, absolutely arbitrary, has not always been allowed by the Tribunals, and it is also criticized by the text-writers (Lyon-Caen and Renault, vol. 2, No. 940; Desjardins, vol. 2, No. 1056).

Question 10.—In the note to Art. 419, it is stated that passengers' baggage is exempt from contribution. Must it be contributed for if sacrificed for the common safety, *e.g.*, if damaged by water used to extinguish a fire? Perhaps Art. 420 precludes any contribution in general average for a loss of baggage, as generally no bill of lading is given for it.

Answer.—Art. 420, construed literally, would not allow contribution for loss of, or damage to, passengers' baggage. On the other hand, this same Article would oblige it to contribute to general average, if saved. In practice it is never made to contribute, the reason being chiefly the difficulty, if not impossibility, of fixing the contributory value.

M. Ch. Lyon-Caen, whom I have consulted on this point, thinks that notwithstanding Art. 420, passengers' baggage ought to be treated on the same principle as the effects of the crew, which are governed by Art. 419. It ought not to contribute if saved, but if sacrificed its value ought to be made good in general average. And in this case (but in this case only) it ought to contribute. This is the rule of the German law.

Question 11.—Where ought the adjustment to be made (a) when the voyage is broken up at the port of loading, (b) when the voyage is broken up at a port of refuge, whence the cargo is forwarded to its destination in another ship?

Answer.—A distinction must be made. If, in these two cases, the charterparty is annulled at the port of loading or of refuge, the adjustment ought to be made at such port, as there the definite separation of the interests takes place.

If, however, in order to avoid increased expense, the parties agree that the cargo shall be forwarded from the loading port to its port of destination, in another vessel certainly, but under the original contract of affreightment, the voyage is not broken in the legal sense of the term, and the adjustment ought to be made at the port of destination, as the separation of the interests only takes place there.

Question 12.—Is the jettison of the ship's hawsers or other gear kept on deck contrary to maritime usage, a general average loss?

Answer.—No. The sacrifice of an article stowed on deck is never allowed in general average, except on short coasting voyages.

Question 13.—Is loss or damage sustained by the cargo during a forced discharge from a stranded vessel general average?

Answer.—Yes, if the discharge was effected to enable the ship to be refloated.

Question 14.—When a voyage has been broken up at an intermediate port, on what value is cargo, previously jettisoned, contributed for in general average?

Answer.—On its value at the place where, in regular course, it ought to have been discharged, *i.e.*, on principle, the intended port of destination. If, however, only part of the cargo was sacrificed before the ship put into the port of distress, and as regards the remainder of the cargo the charterparty is annulled at the port of distress, the cargo sacrificed is contributed for on its value at this port, which by agreement has become the port where the voyage terminates.

APPENDIX J.



THE LAW OF GERMANY.

The law of average is contained in the Commercial Code for the German Empire. This Code is derived from the Allgemeine Deutsche Handelsgesetzbuch, which was prepared under the following circumstances. In 1856 the then Germanic Confederation determined to convoke a meeting of delegates for the purpose of agreeing upon one general mercantile law for the whole of their territory. The Prussian Government thereupon appointed three committees of merchants, one in Stettin, one in Danzig, and one in Königsberg, to make the needful investigations and prepare the draft of a Code, with reasons in support of each clause. The German Commissioners met at Hamburg in April, 1858, assisted by delegates from the more important mercantile communities of Germany, selected for their practical knowledge; and, in the result, after the draft thus prepared had been referred to the different governments for approval, that Code was adopted in 1862 (*a*).

Following the political evolution of Germany, the law embodied in that Code was declared in 1869 to be the federal law of the States forming the North German Federation, and, after the foundation of the German Empire in 1871, it became the law of all the States forming the Empire. In the course of time, and in connection with the contemplated introduction of a new Code of Civil Law, a revision of the Commercial Code was entered upon, and, after having been adopted by the legislative body, this new Commercial Code came into operation, under the denomination "Handelsgesetzbuch für das Deutsche Reich," on the 1st January, 1900, at the same time as the new Code of Civil Law.

The Fourth Book of this Commercial Code treats of the maritime law, and the seventh section of this Book deals with the law of average.

(*a*) Wendt, Maritime Legislation, 2nd edit. Intr. xxvii.—xxviii.; Arnold, the Maritime Code of the German Empire.

Apart from some minor details, there is practically no difference between the wording of the new and old Code in this section.

*DAS HANDELSGESETZBUCH
FÜR DAS DEUTSCHE REICH.*

VIERTES BUCH.

SIEBENTER ABSCHNITT.

HAVEREI.

ERSTER TITEL.

GROSSE (GEMEINSCHAFTLICHE) HAVEREI UND BESONDERE HAVEREI.

§ 700. Alle Schäden, die dem Schiff oder der Ladung oder beiden zum Zweck der Errettung beider aus einer gemeinsamen Gefahr von dem Schiffer oder auf dessen Geheiss vorsätzlich zugefügt werden, sowie auch die durch solche Massregeln ferner verursachten Schäden, ingleichen die Kosten, die zu demselben Zweck aufgewendet werden, sind grosse Haverei.

Die grosse Haverei wird von Schiff, Fracht und Ladung gemeinschaftlich getragen.

§ 701. Alle nicht zur grossen Haverei gehörigen, durch einen Unfall verursachten Schäden und Kosten, soweit die letzteren nicht unter den § 621 (b) fallen, sind besondere Haverei.

*COMMERCIAL CODE FOR THE
GERMAN EMPIRE.*

FOURTH BOOK.

SEVENTH SECTION.

AVERAGE.

TITLE 1.

GENERAL (COMMON) AND PARTICULAR AVERAGE.

§ 700. All damage intentionally done to ship or cargo, or both, by the master or by his orders, for the purpose of rescuing both from a common danger, together with any further damage caused by such measures, and also expenses incurred for the same purpose, are general average.

General average is borne by ship, freight, and cargo in common.

§ 701. All damage and expense caused by an accident, and not belonging to general average, so far as they do not fall under § 621 (b), are particular average.

(b) § 621. Ausser der Fracht können Kaplaken, Prämien und dergleichen nicht gefordert werden, sofern sie nicht ausbedungen sind.

Die gewöhnlichen und ungewöhnlichen Unkostender Schiffahrt, als: Lootsengeld, Hafengeld, Leuchtfeuergeld, Schlepplohn, Quarantainegelder, Auseisungskosten und dergleichen, fallen in Ermangelung

(b) § 621. Primage, gratuities, and the like, cannot be demanded in addition to the freight, except when stipulated for.

The ordinary and extraordinary expenses of navigation, such as pilotage, port dues, lights, towage, quarantine dues, cutting through ice, and the like, are, in the absence of a stipulation to the con-

Die besondere Haverei wird von den Eigenthümern des Schiffs und der Ladung, von jedem für sich allein, getragen.

* § 702. Die Anwendung der Bestimmungen über grosse Haverei wird dadurch nicht ausgeschlossen, dass die Gefahr in Folge des Verschuldens eines Dritten oder auch eines Betheiligten herbeigeführt ist.

Der Betheiligte, welchem ein solches Verschulden zur Last fällt, kann jedoch nicht allein wegen der ihm etwa entstandenen Schäden keine Vergütung fordern, sondern er ist auch den Beitragspflichtigen für den Verlust verantwortlich, den sie dadurch erleiden, dass der Schaden als grosse Haverei zur Vertheilung kommt.

Ist die Gefahr durch eine Person der Schiffsbesatzung verschuldet, so trägt die Folgen dieses Verschuldens auch der Rheder nach Massgabe der §§ 485, 486 (c).

Particular average is borne by the owners of the ship and the cargo respectively, each bearing his own loss.

§ 702. The application of the rules for general average is not debarred by the fact that the danger has been occasioned by the fault of a third party, or even of one of the parties interested in the adventure.

The party interested who is in fault is, however, not only precluded from claiming compensation for any loss he may himself have sustained, but is likewise answerable to each contributor for the loss which the latter may suffer by reason of the damage being apportioned as general average.

If the danger has arisen through the fault of one of the crew, the shipowner also is, subject to the conditions of §§ 485, 486 (c), answerable for the consequences.

einer entgegenstehenden Abrede dem Verfrachter allein zur Last, selbst wenn er zu den Massregeln, welche die Auslagen verursacht haben, auf Grund des Frachtvertrages nicht verpflichtet war.

Die Fälle der grossen Haverei, sowie die Fälle der Aufwendung von Kosten zur Erhaltung, Bergung und Rettung der Ladung werden durch die Vorschriften des Abs. 2 nicht berührt.

(c) § 485. Der Rheder ist für den Schaden verantwortlich, welchen eine Person der Schiffsbesatzung einem Dritten durch ihr Verschulden in Ausführung ihrer Dienstverrichtungen zufügt.

§ 486. Der Rheder haftet für den Anspruch eines Dritten nicht persönlich,

contrary, to be borne by the shipowner alone, even though the measures which have necessitated this expense were not obligatory under the contract of affreightment.

Cases of general average, as well as the case of expenditure for the cost of preserving, warehousing, or rescuing the cargo, are not affected by the provisions of paragraph 2.

(c) § 485. The shipowner is answerable for any loss occasioned to a third party by the master or any of the crew through their fault in the performance of their duties in his service.

§ 486. The shipowner is not personally liable to the claim of a third party, but

§ 703. Die Haverei-vertheilung tritt nur ein, wenn sowohl das Schiff als auch die Ladung, und zwar jeder dieser Gegenstände entweder ganz oder theilweise wirklich gerettet worden ist.

§ 704. Die Verpflichtung, von einem geretteten Gegenstande beizutragen, wird dadurch, dass derselbe später von einer besonderer Haverei betroffen wird, nur dann vollständig aufgehoben, wenn der Gegenstand ganz verloren geht.

§ 705. Der Anspruch auf Vergütung einer zur grossen Haverei gehörenden Beschädigung wird durch eine besondere Haverei,

§ 703. Average contribution takes place only when both the ship and the cargo, each either wholly or in part, have actually been saved.

§ 704. The obligation to contribute on the part of an article saved is only completely annulled when the article, owing to its having subsequently suffered particular average, is entirely destroyed.

§ 705. The right to compensation for damage belonging to general average is only taken away by a particular average

sondern er haftet nur mit Schiff und Fracht:

1. wenn der Anspruch auf ein Rechtsgeschäft gegründet wird, welches der Schiffer als solcher kraft seiner gesetzlichen Befugnisse, und nicht mit Bezug auf eine besondere Vollmacht geschlossen hat:

2. wenn der Anspruch auf die Nichterfüllung oder auf die unvollständige oder mangelhafte Erfüllung eines von dem Rheder abgeschlossenen Vertrages gegründet wird, sofern die Ausführung des Vertrages zu den Dienstobliegenheiten des Schiffers gehört hat, ohne Unterschied, ob die Nichterfüllung oder die unvollständige oder die mangelhafte Erfüllung von einer Person der Schiffsbesatzung verschuldet ist oder nicht:

3. wenn der Anspruch auf das Verschulden einer Person der Schiffsbesatzung gegründet wird:

Diese Vorschrift findet in den Fällen der No. 1, 2, keine Anwendung, wenn den Rheder selbst in Ansehung der Vertragserfüllung ein Verschulden trifft, oder wenn er die Vertragserfüllung besonders gewährleistet hat.

only to the extent of the ship and freight [*in rem*]:

1. when the claim is founded upon a legal transaction [*acte, e.g., a bottomry bond*] which the captain as such has signed in virtue of his [ordinary] legal authority, and not in virtue of a special authorization:

2. when the claim is founded on the non-performance or incomplete or faulty performance of a contract concluded by the owner, so far as the carrying out of the contract has fallen within the obligations of the master as his servant, no matter whether or not the non-performance or incomplete or faulty performance arose from the fault of the master or seamen:

3. when the claim is founded on the fault of a person of the ship's crew [master or seaman].

This provision is not applicable, however, in the cases within Nos. 1 and 2, if the shipowner is himself in fault with respect to the performance of the contract, or if he has himself expressly guaranteed its performance.

welche den beschädigten Gegenstand später trifft, sei es, dass er von Neuem beschädigt wird oder ganz verloren geht, nur dann aufgehoben, wenn der spätere Unfall mit dem früheren in keinem Zusammenhange steht, und nur insoweit als der spätere Unfall auch den früheren Schaden nach sich gezogen haben würde, wenn dieser nicht bereits entstanden gewesen wäre.

Sind jedoch vor Eintritt des späteren Unfalles zur Wiederherstellung des beschädigten Gegenstandes bereits Aufwendungen gemacht, so bleibt rücksichtlich dieser Anspruch auf Vergütung bestehen.

§ 706. Grosse Haverei liegt namentlich in folgenden Fällen vor, vorausgesetzt, dass in denselben zugleich die Erfordernisse der §§ 700, 702 und 703, insoweit vorhanden sind, als in den folgenden Vorschriften nichts Besonderes bestimmt ist:—

1. Wenn Waaren, Schiffstheile oder Schiffsgeräthschaften über Bord geworfen, Masten gekappt, Taue oder Segel weggeschnitten, Anker, Ankertaue oder Ankerketten geschlippt oder gekappt werden,

Sowohl diese Schäden selbst als die durch solche Massregeln an Schiff oder Ladung ferner verursachten Schäden gehören zur grossen Haverei.

2. Wenn zur Erleichterung des

which subsequently affects the damaged article, whether this be again damaged or totally destroyed, when the later accident was entirely independent of the earlier one, and only in so far as the later accident would have likewise occasioned the earlier damage, if this had not already taken place.

If, however, before the occurrence of the later accident expense has already been incurred for the restoration of the damaged object, the claim for compensation holds good in regard to such expenditure.

§ 706. General average takes place in particular in the following cases, assuming that the requirements of §§ 700, 702 and 703 are likewise satisfied in so far as the matter is not expressly dealt with in the following rules:—

1. When goods, ship's materials or ship's furniture, are thrown overboard, masts cut away, ropes or sails cut away, anchors or cables slipped or cut away,

Not only this damage itself, but also the further damage caused to ship or cargo through such measures, belong to general average.

2. When in order to lighten the

Schiffs die Ladung ganz oder theilweise in Leichterfahrzeuge übergeladen wird,

Es gehört zur grossen Haverei sowohl der Leichterlohn als der Schaden, der bei dem Ueberladen in das Leichterfahrzeug oder bei dem Rückladen in das Schiff der Ladung oder dem Schiff zugefügt wird, sowie der Schaden, den die Ladung auf dem Leichterfahrzeug erleidet.

Muss die Erleichterung im regelmässigen Verlauf der Reise erfolgen, so liegt grosse Haverei nicht vor.

3. Wenn das Schiff absichtlich auf den Strand gesetzt wird, jedoch nur wenn es zum zwecke der Abwendung des Unterganges oder der Nehrung geschieht,

Sowohl die durch die Strandung einschliesslich der Abbringung entstehenden Schäden, als auch die Kosten der Abbringung gehören zur grossen Haverei.

Wird das behufs Abwendung des Unterganges auf den Strand gesetzte Schiff nicht abgebracht oder nach der Abbringung reparaturunfähig (§ 479) (d) befunden, so findet eine Havereiverteilung nicht statt.

ship the cargo is wholly or in part discharged into lighters,

there belongs to general average not only the hire of the lighters, but also the damage which is occasioned either to the ship or cargo by the transshipment of the cargo into the lighters and by the reloading, together with the damage which the cargo sustains on board the lighters.

When the lightening of the ship must take place in the ordinary course of the voyage, there is no general average.

3. When the ship is intentionally stranded (only, however, when the object of the stranding is to prevent her foundering or being captured),

Not only the damage done through the stranding, inclusive of the bringing-off, but also the expenses of bringing her off, belong to general average.

If the ship, which has been put aground to prevent her foundering, is not brought off, or is found to be irreparable after she has been brought off (§ 479) (d), no average contribution takes place.

(d) § 479. Im Sinne dieses vierten Buches gilt ein seeuntüchtig gewordenes Schiff:

1. als reparaturunfähig, wenn die Reparatur des Schiffs überhaupt nicht möglich ist, oder an dem Ort, wo das Schiff sich befindet, nicht bewerkstelligt, das Schiff auch nicht nach dem Hafen, wo die Reparatur auszuführen wäre, gebracht werden kann:

(d) § 479. In the meaning of this Fourth Book a ship is understood to be unseaworthy:

1. as incapable of repair, when the repair of the ship is altogether impossible, or cannot be effected at the place where the ship lies, and the ship cannot be removed to a harbour where she might be repaired:

Strandet das Schiff, ohne dass die Strandung zur Rettung von Schiff und Ladung vorsätzlich herbeigeführt ist, so gehören zwar nicht die durch die Strandung veranlassten Schäden, wohl aber die auf die Abbringung verwendeten Kosten und die zu diesem Zweck dem Schiff oder der Ladung absichtlich zugefügten Schäden zur grossen Haverei.

4. Wenn das Schiff zur Vermeidung einer dem Schiff und der Ladung im Falle der Fortsetzung der Reise drohenden gemeinsamen Gefahr in einen Nothhafen eingelaufen ist, insbesondere wenn das Einlaufen zur nothwendigen Ausbesserung eines Schadens erfolgt, den das Schiff während der Reise erlitten hat,

Es gehören in diesem Falle zur grossen Haverei: die Kosten des Einlaufens und des Auslaufens, die das Schiff selbst treffenden Aufenthaltskosten, die der Schiffsbesatzung während des Aufenthalts gebührende Heuer und Kost, die Auslagen für die Unterbringung der Schiffsbesatzung am

If the ship is stranded, without this having been intentionally done for the preservation of ship and cargo, the damage occasioned by the stranding is not, but the cost of bringing her off, together with the damage intentionally done to the ship or cargo for this purpose, is the subject of general average.

4. When the ship, in order to avoid a common danger threatening ship and cargo in case the voyage be continued, is run into a harbour of refuge, particularly when the running in is for the necessary repairing of damage which the ship has suffered during the voyage,

there belong in this case to general average, the expense of going in and coming out; the expenses attaching to the ship herself for the stay; the wages and maintenance of the crew during the stay, as well as the expenses of lodging the crew on shore, so long as they cannot remain on

2. als reparaturunwürdig, wenn die Kosten der Reparatur ohne Abzug für den Unterschied zwischen alt und neu mehr betragen würden, als drei Viertel seines früheren Werths.

Ist die Seenüchtheit während einer Reise eingetreten, so gilt als der frühere Werth derjenige, welchen das Schiff bei dem Antritt der Reise gehabt hat; in den übrigen Fällen derjenige, welchen das Schiff, bevor es seeuntüchtig geworden ist, gehabt hat oder bei gehöriger Ansrüstung gehabt haben würde.

2. as not worth repairing, when the cost of repair, without deduction for the difference between old and new, would amount to more than three-quarters of the ship's former value.

If the unseaworthiness has taken place during a voyage, the former value is to be taken as that which the ship had at the commencement of the voyage; in other cases as that which the ship had before she became unseaworthy, or would have had after being properly fitted out.

Lande, solange die Besatzung nicht an Bord verbleiben kann, ferner, falls die Ladung wegen des Grundes, welcher das Einlaufen in den Nothhafen herbeigeführt hat, gelöscht werden muss, die Kosten des Verbringens von Bord und an Bord, sowie die Kosten der Aufbewahrung der Ladung am Lande bis zu dem Zeitpunkte, in welchem sie wieder an Bord gebracht werden kan,

Die sämmtlichen Aufenthaltskosten kommen nur für die Zeit der Fortdauer des Grundes in Rechnung, der das Einlaufen in den Nothhafen herbeigeführt hat. Liegt der Grund in einer nothwendigen Ausbesserung des Schiffs, so kommen ausserdem die Aufenthaltskosten nur bis zu dem Zeitpunkte in Rechnung, in welchem die Ausbesserung hätte vollendet sein können.

Die Kosten der Ausbesserung des Schiffs gehören nur insoweit zur grossen Haverei, als der auszubessernde Schaden selbst grosse Haverei ist.

5. Wenn das Schiff gegen Feinde oder Seeräuber vertheidigt wird,

Die bei der Vertheidigung dem Schiff oder der Ladung zugefügten Beschädigungen, der dabei verbrauchte Schiessbedarf und, falls eine Person der Schiffsbesatzung bei der Vertheidigung verwundet oder vertödtet ist, die Heilungs- und Begräbnisskosten, sowie die nach den §§ 553, 554 dieses Gesetz-

board; and further, in case the cargo must be discharged on account of the motive which led to putting into the port of refuge, the cost of discharging and reloading, and the cost of warehousing the cargo on shore up to the time when it can be taken on board again.

The several expenses of the stay in port are to be brought into the account only for the period of time which the motive for putting in has necessarily caused to be occupied. If the motive is the necessary repairing of the ship, the cost of the stay is to be brought into account only up to the time when the repairs could have been completed.

The cost of repairing the ship belongs to general average, only so far as the damage to the ship itself is general average.

5. When the ship is defended against enemies or pirates,

the damage done to the ship or cargo in consequence of the defence, the ammunition expended, and in case any of the crew are wounded or killed in the defence, the cost of their cure or interment, as well as the rewards to be paid in accordance with §§ 553, 554 of this Code and §§ 61, 64 of the

buches und den §§ 61, 64 der Seemannsordnung zu zahlenden Belohnungen (e) bilden die grosse Haverei.

Seamen's Act (e), are general average.

(e) § 553. Falls der Schiffer nach Antritt der Reise erkrankt oder verwundet wird, so trägt der Rheder die Kosten der Verpflegung und Heilung:

1. wenn der Schiffer mit dem Schiff zurückkehrt und die Rückreise in dem Heimathshafen oder in dem Hafen endet, wo er geheuert worden ist, bis zur Beendigung der Rückreise;

2. wenn er mit dem Schiff zurückkehrt und die Reise nicht in einem der genannten Häfen endet, bis zum Ablauf von sechs Monaten seit Beendigung der Rückreise;

3. wenn er während der Reise am Lande zurückgelassen werden musste, bis zum Ablauf von sechs Monaten seit der Weiterreise des Schiffes.

Auch kann der Schiffer in den beiden letzteren Fällen freie Rückbeförderung (§ 547) oder nach seiner Wahl eine entsprechende Vergütung beanspruchen.

Die Heuer einschliesslich aller sonst bedungenen Vortheile bezieht der nach Antritt der Reise erkrankte oder verwundete Schiffer, wenn er mit dem Schiff zurückkehrt, bis zur Beendigung der Rückreise, wenn er am Lande zurückgelassen werden musste, bis zu dem Tage, an welchem er das Schiff verlässt.

Ist der Schiffer bei Vertheidigung des Schiffes beschädigt, so hat er überdies auf eine angemessene Belohnung Anspruch.

§ 554. Stirbt der Schiffer nach Antritt des Dienstes, so hat der Rheder die bis zum Todestage verdiente Heuer einschliesslich aller sonst bedungenen Vortheile zu entrichten; ist der Tod nach Antritt der Reise erfolgt, so hat der Rheder auch die Beerdigungskosten zu zahlen.

Wird der Schiffer bei Vertheidigung des Schiffes getödtet, so hat der Rheder überdies eine angemessene Belohnung zu zahlen.

(e) § 553. In case the master, after the outset of the voyage, falls sick or is wounded, the owner bears the expense of his care and healing:

1. when the master returns with the ship, and the return voyage ends at the home port, or at the port where he was hired, then until the end of the voyage;

2. when he returns with the ship, and the voyage does not end at one of the ports above-named, then until the expiration of six months from the end of the return voyage;

3. when during the voyage he must be left behind on shore, then until the expiry of six months from the return of the ship.

The master is also entitled in the two latter cases to a free return passage (§ 547), or, at his option, to a corresponding compensation.

The master who has been invalided or wounded after the outset of the voyage is entitled to his wages, together with all stipulated perquisites, if he returns with the ship, up to the end of the voyage; if he is obliged to be left behind on shore, up to the day when he leaves the ship.

If the captain is injured in the defence of the ship, he is in addition entitled to a reasonable compensation.

§ 554. If the master dies after entering upon the service, the owner must pay his wages inclusive of all stipulated perquisites up to the day of his death; if the death takes place after the outset of the voyage, the owner is also to pay the expense of the burial.

If the master is killed in the defence of the ship, the owner is in addition to pay a reasonable compensation.

6. Wenn im Fall der Anhaltung des Schiffes durch Feinde oder Seeräuber Schiff und Ladung losgekauft werden,

Was zum Loskauf gegeben ist, bildet nebst den durch den Unterhalt und die Auslösung der Geisseln entstehenden Kosten die grosse Haverei.

7. Wenn die Beschaffung der zur Deckung der grossen Haverei während der Reise erforderlichen Gelder Verluste und Kosten verursacht, oder wenn durch die Auseinandersetzung unter den Be-theiligten Kosten entstehen,

Diese Verluste und Kosten gehören gleichfalls zur grossen Haverei.

Dahin werden insbesondere gezählt der Verlust an den während der Reise verkauften Gütern, die Bodmereiprämie, wenn das erforderliche Geld durch Bodmerei aufgenommen wird, und wenn dies nicht der Fall ist, die Prämie für Versicherung des aufgewendeten Geldes, die Kosten für die Ermittlung der Schäden und für die Aufmachung der Rechnung über die grosse Haverei (Dispache).

Seemannsordnung.

Auszug aus § 61. Ist der Schiffsmann bei Vertheidigung des Schiffes zu schaden gekommen, so hat er auf eine angemessene, im streitfalle vom seemannsante vorläufig festzusetzende Belohnung Anspruch.

Auszug aus § 64. Wird der Schiffsmann bei Vertheidigung des Schiffes getödtet, so hat der Rheder eine angemessene, erforderlichen Falles von dem Richter zu bestimmende Belohnung zu entrichten.

6. When in case of capture of the ship by enemies or pirates the ship and cargo are ransomed,

what is given as ransom, together with the expense incurred for the maintenance and release of the hostages, is general average.

7. When the raising of money required during the voyage for covering general average occasions losses and expense, or when expense is incurred for the apportionment among the parties interested,

these losses and expenses belong likewise to general average.

In particular these include the loss on goods sold during the voyage, bottomry premiums when the requisite funds have been raised on bottomry, and, when this is not the case, premiums for insuring the amount expended, the cost of estimating the damage, and of making up the general average statement (Dispache).

Seamen's Act.

Extract from § 61. If a seaman is injured in the defence of the ship, he is entitled to a reasonable compensation, to be determined provisionally, in case of dispute, by the Registrar-General of Seamen.

Extract from § 64. If a seaman is killed in the defence of the ship, the owner is to pay a reasonable compensation, to be determined if necessary by the judge.

§ 707. Nicht als grosse Haverei, sondern als besondere Haverei werden angesehen:

1. die Verluste und Kosten, welche, wenn auch während der Reise, aus der in Folge einer besonderen Haverei nöthig gewordenen Beschaffung von Geldern entstehen:

2. die Reclamekosten, auch wenn Schiff und Ladung zusammen und beide mit Erfolg reclamirt werden:

3. die durch Prangen verursachte Beschädigung des Schiffs, seines Zubehörs und der Ladung, selbst wenn, um der Strandung oder Nehrung zu entgehen, geprangt worden ist.

§ 708. In den Fällen der grossen Haverei bleiben bei der Schadensberechnung die Beschädigungen und Verluste ausser Ansatz, welche die nachstehenden Gegenstände betreffen:

1. nicht unter Deck geladene Güter; diese Vorschrift findet jedoch bei der Küstenschiffahrt insofern keine Anwendung, als Deckladungen durch die Landesgesetze für zulässig erklärt sind (§ 566) (f);

(f) § 566. Ohne Zustimmung des Ab-laders dürfen dessen Güter weder auf das Verdeck verladen, noch an die Seiten des Schiffs gehängt werden.

Die Landesgesetze können bestimmen, dass diese Vorschrift, soweit sie die Be-

§ 707. The following are treated, not as general, but as particular average:

1. losses and expenses which, even during the voyage, result from the procuring of money which has become necessary in consequence of a particular average;

2. expenses of reclaiming (the property), even though ship and cargo have been reclaimed together, and both with success;

3. damage done to the ship, its appurtenances, and the cargo by carrying a press of sail, even when carried in order to escape stranding or capture.

§ 708. In cases of general average, damage and loss which are sustained by the undermentioned articles, are not to be contributed for:

1. goods not laden under deck: this regulation is, however, inapplicable to the coasting-trade, in so far as in regard thereto deck-loading has been declared by the laws of the several States (§ 566) (f) to be permissible;

(f) § 566. Without the consent of the shipper his goods must neither be laden on the deck nor hung at the sides of the ship.

It is reserved to the laws of the different States to determine that, in regard to the

2. Güter, über die weder ein Conossement ausgestellt ist noch das Manifest oder Ladebuch Auskunft giebt;

3. Kostbarkeiten, Kunstgegenstände, Geld und Werthpapiere, die dem Schiffer nicht gehörig bezeichnet worden sind (§ 607) (g).

§ 709. Der an dem Schiff oder dem Zubehör des Schiffes entstandene, zur grossen Haverei gehörige Schaden ist, wenn die Ausbesserung während der Reise erfolgt, am Ort der Ausbesserung und vor dieser, sonst an dem Ort, wo die Reise endet, durch Sachverständige zu ermitteln und zu schätzen. Die Taxe muss die Veranschlagung der erforderlichen Reparaturkosten enthalten. Sie ist, wenn während der Reise ausgebessert wird, für die Schadensberechnung insoweit massgebend, als nicht die Ausführungskosten unter den Anschlagsummen bleiben. War die Aufnahme einer Taxe nicht ausführbar, so entscheidet der Betrag der auf die erforderlichen Reparaturen wirklich verwendeten Kosten.

2. goods as to which neither a bill of lading has been made out, nor any mention made in the manifest or cargo-book:

3. valuables, works of art, money, and securities (papers of value) which have not been properly notified to the master (§ 607) (g).

§ 709. Damage belonging to general average, which has been sustained by the ship or its appurtenances, must be surveyed and valued by experts, if the repair takes place during the voyage, at the place of repairing and before repairing, otherwise at the place where the voyage ends. The estimate must contain a specification of the probable cost of the requisite repairs. When the repairs are to be made during the voyage, this estimate is conclusive so far as the actual cost of repairing does not fall below the estimate. If the obtaining of an estimate is not practicable, the amount actually expended on the requisite repairs is conclusive.

ladung des Verdecks betrifft, auf die Küstenschiffahrt keine Anwendung findet.

(g) § 607. Für Kostbarkeiten, Kunstgegenstände, Geld und Werthpapiere haftet der Verfrachter nur, wenn diese Beschaffenheit oder der Werth der Güter bei der Abladung dem Schiffer angegeben worden ist.

coasting trade, the above regulation, so far as it relates to the lading on deck, shall not be applicable.

(g) § 607. For valuables, works of art, money, and papers of value, the shipowner is only answerable in case their description or the value of the goods has at the time of shipment been notified to the master.

Soweit die Ausbesserung nicht während der Reise geschieht, ist die Abschätzung für die Schadensberechnung ausschliesslich massgebend.

§ 710. Der nach Massgabe des § 709 ermittelte volle Betrag der Reparaturkosten bestimmt die zu leistende Vergütung, wenn das Schiff zur Zeit der Beschädigung noch nicht ein volles Jahr zu Wasser war.

Dasselbe gilt von der Vergütung für einzelne Theile des Schiffes, namentlich für die Metalhaut, sowie für einzelne Theile des Zubehörs, wenn solche Theile noch nicht ein volles Jahr in Gebrauch waren.

In den übrigen Fällen wird von dem vollen Betrage wegen des Unterschiedes zwischen alt und neu ein Drittel, bei den Ankerketten ein Sechstel, bei den Ankern jedoch nichts abgezogen.

Von dem vollen Betrage kommen ferner in Abzug der volle Erlös oder Werth der etwa noch vorhandenen alten Stücke, welche durch neue ersetzt sind oder zu ersetzen sind.

Findet ein solcher Abzug und zugleich der Abzug wegen des Unterschiedes zwischen alt und neu statt, so ist zuerst dieser letztere und sodann erst von dem verbleibenden Betrage der andere Abzug zu machen.

§ 711. Die Vergütung für aufgeopferte Güter wird durch den Marktpreis bestimmt, welchen

So far as repairing during the voyage does not take place, the valuation is conclusively taken as the measure of the claim.

§ 710. The full amount of the cost of repair, computed in accordance with § 709, determines the compensation to be allowed, if the ship, at the time of the damage, had not been a full year afloat.

The same rule holds good of the compensation for specific portions of the ship, particularly for the metal sheathing, as well as for specific parts of the appurtenances, when such parts have not yet been in use for a full year.

In other cases there is to be deducted from the full amount, on account of the difference between old and new, one-third; from chain cables, however, one-sixth, and from anchors, nothing.

From the total amount there are further to be deducted the full proceeds or value of any yet remaining old materials, which have been or are to be replaced with new.

If such deduction, and likewise the deduction on account of the difference between old and new, have both to be made, this latter is to be made first, and afterwards the former deduction is to be made from the remainder.

§ 711. The indemnification for goods sacrificed is determined by the market price which goods of

Güter derselben Art und Beschaffenheit am Bestimmungsort bei Beginn der Löschung des Schiffes haben.

In Ermangelung eines Marktpreises, oder insofern über denselben oder über dessen Anwendung, insbesondere mit Rücksicht auf die Beschaffenheit der Güter, Zweifel bestehen, wird der Preis durch Sachverständige ermittelt.

Von dem Preise kommt in Abzug, was an Fracht, Zöllen und Unkosten in Folge des Verlustes der Güter erspart wird.

Zu den aufgeopferten Gütern gehören auch diejenigen, welche zur Deckung der grossen Haverei verkauft worden sind. (§ 706, No. 2.)

§ 712. Die Vergütung für Güter, die eine zur grossen Haverei gehörige Beschädigung erlitten haben, wird bestimmt durch den Unterschied zwischen dem durch Sachverständige zu ermittelnden Verkaufswerth, welchen die Güter im beschädigten Zustande am Bestimmungsorte bei Beginn der Löschung des Schiffes haben, und dem im § 711 bezeichneten Preise nach Abzug der Zölle und Unkosten, soweit sie in Folge der Beschädigung erspart sind.

§ 713. Die vor, bei oder nach dem Havereifall entstandenen zur grossen Haverei nicht gehörenden Werthsverringerungen und Verluste sind bei Berechnung der Vergütung (§§ 711, 712), in Abzug zu bringen.

the same kind and quality have at the place of destination on the commencement of the discharge.

In the absence of a market price, or so far as doubt may exist concerning it or concerning its application, especially with regard to the quality of the goods, the price is to be estimated by experts.

From the price there must be deducted whatever amount of freight, duties, and expenses have been saved in consequence of the loss of the goods.

Goods which have been sold to cover the expense of the general average are also included among goods sacrificed. (§ 706, No. 2.)

§ 712. The indemnification for goods which have sustained general average damage is determined by the difference between the selling value, as estimated by experts, which the goods in their damaged condition have at the place of destination at the commencement of the discharge, and their value, as indicated in § 711 after deduction of duties and expenses so far as these have been saved in consequence of the damage.

§ 713. Diminutions of value and losses, not belonging to general average, which have taken place before, during, or after the average act are, in calculating the indemnification (§§ 711, 712), to be allowed for.

§ 714. Endet die Reise für Schiff und Ladung nicht im Bestimmungshafen, sondern an einem anderen Orte, so tritt dieser letztere, endet sie durch Verlust des Schiffs, so tritt der Ort, wohin die Ladung in Sicherheit gebracht ist, für die Ermittlung der Vergütung an die Stelle des Bestimmungs-ortes.

§ 715. Die Vergütung für entgangene Fracht wird bestimmt durch den Frachtbetrag, welcher für die aufgeopferten Güter zuentrichten gewesen sein würde, wenn sie mit dem Schiff an dem Orte ihrer Bestimmung, oder, wenn dieser von dem Schiff nicht erreicht wird, an dem Orte angelangt wären, wo die Reise endet.

§ 716. Der gesammte Schaden, welcher die grosse Haverei bildet, wird über das Schiff, die Ladung und die Fracht nach Verhältniss des Werths des Schiffes und der Ladung und des Betrags der Fracht vertheilt.

§ 717. Das Schiff nebst Zubehör trägt bei:

1. Mit dem Werthe, welchen es in dem Zustande am Ende der Reise bei Beginn der Löschung hat;

2. mit dem als grosse Haverei in Rechnung kommenden Schaden an Schiff und Zubehör.

Von dem im Abs. 1, No. 1, bezeichneten Werth ist der noch vorhandene Werth derjenigen Ausbes-

§ 714. If the voyage ends for both ship and cargo not at the place of destination but at some other place, this latter place takes the place of the port of destination as regulating the indemnification: but if the voyage is ended by the loss of the ship, the place to which the cargo is brought in safety must regulate it.

§ 715. The indemnification for loss of freight is to be determined by the amount of freight which would have been payable for the goods sacrificed if these had, with the ship, reached the place of their destination, or, if this was not reached by the ship, at the place where the voyage ended.

§ 716. The aggregate loss which forms general average is apportioned over the ship, the cargo, and the freight, in proportion to the values of the ship and cargo and the amount of the freight.

§ 717. The ship with its appurtenances contributes:

1. On the value which it has in its condition at the end of the voyage on commencement of the discharge;

2. on the amount of damage to ship and appurtenances coming into account as general average.

From the value indicated by No. 1 is to be deducted the still-existing value of such repairs and

serungen und Anschaffungen abzuziehen, welche erst nach dem Havereifall erfolgt sind.

§ 718. Die Ladung trägt bei:

1. mit den am Ende der Reise bei Beginn der Löschung noch vorhandenen Gütern, oder, wenn die Reise durch den Verlust des Schiffs endet (§ 714), mit den in Sicherheit gebrachten Gütern, soweit in beiden Fällen diese Güter sich zur Zeit des Havereifalls am Bord des Schiffs oder eines Leichterfahrzeuges (§ 706, No. 2) befunden haben;

2. mit den aufgeopferten Gütern (§ 711).

§ 719. Bei Ermittlung des Beitrags kommt in Ansatz:

1. für Güter, die unversehrt sind, der Marktpreis oder der durch Sachverständige zu ermittelnde Preis (§ 711), welchen sie am Ende der Reise bei Beginn und am Orte der Löschung des Schiffs, oder, wenn die Reise durch Verlust des Schiffs endet (§ 714), zur Zeit und am Orte der Bergung haben, nach Abzug der Fracht, Zölle und sonstigen Unkosten;

2. für Güter, die während der Reise verdorben sind oder eine zur grossen Haverei nicht gehörige Beschädigung erlitten haben, der durch Sachverständige zu ermittelnde Verkaufswerth (§ 712), welchen die Güter im beschädigten Zustande zu der unter Ziffer 1 er-

equipments as have been supplied subsequently to the average act.

§ 718. The cargo contributes:

1. on the goods which at the end of the voyage on commencement of the discharge are still in existence, or, if the voyage ends by the loss of the ship (§ 714), on those goods which have been brought into safety, so far as in either case such goods were on board the ship or a lighter (§ 706, No. 2);

2. on the goods sacrificed (§ 711).

§ 719. In estimating the amount, there is to be taken:

1. for goods which are undamaged, the market price, or the price as determined by experts (§ 711), which the goods bear at the end of the voyage on commencement of the discharge; or, if the voyage is ended by the loss of the ship (§ 714), which they bear at the place and time of their salvage; after deduction of freight, duties, and other charges;

2. for goods which during the voyage have been spoilt, or have suffered damage not belonging to general average, the selling value, to be determined by experts (§ 712), which the goods in their damaged condition bear at the time and place mentioned in No. 1,

wählten Zeit und an dem dort bezeichneten Orte haben, nach Abzug der Fracht, Zölle und sonstigen Unkosten;

3. für Güter, die aufgeopfert worden sind, der Betrag, welcher dafür nach § 711 als grosse Haverei in Rechnung kommt;

4. für Güter, die eine zur grossen Haverei gehörige Beschädigung erlitten haben, der nach Ziffer 2 zu ermittelnde Werth, welchen die Güter im beschädigten Zustande haben, und der Werthunterschied, welcher nach § 712 für die Beschädigung als grosse Haverei in Rechnung kommt.

§ 720. Sind Güter geworfen, so haben sie zu der gleichzeitigen oder einer späteren grossen Haverei im Falle ihrer Bergung nur beizutragen, wenn der Eigentümer eine Vergütung verlangt.

§ 721. Die Frachtgelder tragen bei mit zwei Drittel:

1. des Bruttobetrages, welcher verdient ist;

2. des Betrages, welcher nach § 715 als grosse Haverei in Rechnung kommt.

Ueberfahrts gelder tragen bei mit dem Betrage, welcher im Falle des Verlustes des Schiffs einge-

after deduction of freight, duties, and other charges;

3. for goods which have been sacrificed, the amount which under § 711 is brought into account for them as general average;

4. for goods which have suffered damage belonging to general average, the value which, as defined under No. 2, those goods have in their damaged condition, together with the difference in value which, under § 712, is brought into account for the damage as general average.

§ 720. If goods are thrown overboard, these are to contribute towards a simultaneous or subsequent general average, in case they are picked up, only when the proprietor of them claims contribution.

§ 721. Freight contributes on two-thirds:

1. of the gross amount which has been earned;

2. of the amount which under § 715 is brought into account as general average.

Passage-money contributes on the amount which would have been forfeited [not earned or to be

büsst wäre (§ 670) (*h*), nach Abzug der Unkosten, die alsdann erspart sein würden.

§ 722. Haftet auf einem beitragspflichtigen Gegenstand eine durch einen späteren Nothfall begründete Forderung, so trägt der Gegenstand nur mit seinem Werthe nach Abzug dieser Forderung bei.

§ 723. Zur grossen Haverei tragen nicht bei:

1. die Kriegs- und Mundvorräthe des Schiffes;

2. die Heuer und die Habe der Schiffsbesatzung;

3. das Reisegeut der Reisenden.

Sind sachen dieser Art aufgeopfert oder haben sie einer zur grossen Haverei gehörige Beschädigung erlitten, so wird dafür nach Massgabe der §§ 711 bis § 715 Vergütung gewährt; für Kostbarkeiten, Kunstgegenstände, Geld und Werthpapiere, wird jedoch

refunded] in case of the loss of the ship (§ 670) (*h*), after deduction of the expenses which in that case would have been escaped.

§ 722. If a contributory article is liable for a claim founded on a subsequent accident, this article contributes only on its value after deduction of such claim.

§ 723. The following do not contribute to general average:

1. the ship's ammunition and victuals;

2. the wages and effects of the crew;

3. Passengers' luggage.

If articles of this kind have been sacrificed or have suffered damage belonging to general average, indemnification is due for them as laid down in §§ 711—715; for valuables, works of art, money, or papers of value, compensation is only due in case the same shall

(*h*) § 670. In allen Fällen, in welchen zufolge der §§ 668 und 669 der Ueberfahrtsvertrag aufgelöst wird, ist kein Theil zur Entschädigung des anderen verpflichtet.

Ist jedoch die Auflösung erst nach Antritt der Reise erfolgt, so hat der Reisende das Ueberfahrtsgeld nach Verhältniss der zurückgelegten zur ganzen Reise zu zahlen.

Bei der Berechnung des zu zahlenden Betrages sind die Vorschriften des § 631 massgebend.

(*h*) § 670. In all cases in which under §§ 668 and 669 the contract of passage is dissolved, neither party is liable to indemnify the other.

If, however, the dissolution takes place after commencement of the voyage, the passenger is to pay passage-money in proportion to the part of the voyage performed.

The amount payable is determined by the rules laid down in § 631.

nur dann Vergütung gewährt, wenn dieselben dem Schiffer gehörig bezeichnet sind (§ 607). Sachen für die eine Vergütung gewährt wird, tragen mit dem Werth oder dem Werthsunterschied bei, welcher als grosse Haverei in Rechnung kommt.

Die im § 708 erwähnten Gegenstände sind beitragspflichtig, so weit sie gerettet sind.

Die Bodmereigelder sind nicht beitragspflichtig.

§ 724. Wenn nach dem Havereifall und bis zum Beginn der Löschung am Ende der Reise ein beitragspflichtiger Gegenstand ganz verloren geht (§ 704), oder zum Theil verloren geht oder im Werthe verringert, insbesondere gemäss § 722 mit einer Forderung belastet wird, so tritt eine verhältnissmässige Erhöhung der von den übrigen Gegenständen zu entrichtenden Beiträge ein.

Ist erst nach dem Beginn der Löschung der Verlust oder die Werthsverringering erfolgt, so geht der Beitrag, welcher auf den Gegenstand fällt, soweit dieser zur Berechtigung des Beitrags unzureichend geworden ist, den Vergütungsberechtigten verloren.

§ 725. Die Vergütungsberechtigten haben wegen der von dem Schiff und der Fracht zu entrichtenden Beiträge die Rechte von Schiffsgläubigern. Auch in Ansehung der beitragspflichtigen Güter steht ihnen an den einzelnen Gütern wegen des von diesen zu

have been properly notified to the master (§ 607). Articles for which indemnification is due, contribute on the value or difference in value which is brought into account as general average.

The articles mentioned in § 708 are liable to contribute so far as they have been saved.

Money lent on bottomry is not liable to contribute.

§ 724. If, after the average-act, and up to the beginning of the discharge at the end of the voyage, a contributory article is entirely lost (§ 704), or is partly lost or diminished in value, in particular if it is liable to a claim under § 722, there must be a proportionate increase in the amounts to be borne by the remaining articles.

If such loss or diminution of value does not occur till after the beginning of the discharge, the amount of contribution which falls upon such article, so far as the latter has become insufficient to bear it, must fall on the party claiming compensation.

§ 725. Those entitled to indemnification have, in respect of the contribution due from the ship and freight, the rights of ship's creditors. Also as against the goods liable to contribute, the said parties have a *lien* on the goods of each severally in respect of their

entrichtenden Beitrages ein Pfandrecht zu. Das Pfandrecht kann jedoch nach der Auslieferung der Güter nicht zum Nachtheil des dritten Erwerbers, welcher den Besitz in gutem Glauben erlangt hat, geltend gemacht werden.

§ 726. Eine persönliche Verpflichtung zur Entrichtung des Beitrages wird durch den Haverfall an sich nicht begründet.

Der Empfänger beitragspflichtiger Güter wird jedoch, wenn ihm bei der Annahme der Güter bekannt ist, dass davon ein Beitrag zu entrichten ist, für den letzteren bis zum Werthe, welchen die Güter zur Zeit ihrer Auslieferung haben, insoweit persönlich verpflichtet, als der Beitrag, falls die Auslieferung nicht erfolgt wäre, aus den Gütern hätte geleistet werden können.

§ 727. Die Feststellung und Vertheilung der Schäden erfolgt an dem Bestimmungsort und, wenn dieser nicht erreicht wird, in dem Hafen, wo die Reise endet.

§ 728. Der Schiffer ist verpflichtet, die Aufmachung der Dis-pache ohne Verzug zu veranlassen. Handelt er dieser Verpflichtung zuwider, so macht er sich jedem Betheiligten verantwortlich.

Wird die Aufmachung der Dis-pache nicht rechtzeitig veranlasst, so kann jeder Betheiligte die Aufmachung in Antrag bringen und betreiben.

respective contributions. This lien, however, cannot, after delivery of the goods, be enforced to the prejudice of a third party who has come into possession of them in good faith.

§ 726. A personal liability for payment of contribution does not arise from a case of general average in itself.

The receiver of contributory goods, however, when it is made known to him on his receipt of the goods that a contribution is due, is so far personally liable for the same, up to the value which the goods had at the time of delivery to him, as the contribution, if the delivery had not taken place, might have been recovered out of the goods.

§ 727. The settlement and apportionment of the losses is to be made at the place of destination, or, if this is not reached, at the place where the voyage ends.

§ 728. It is the duty of the master to have the adjustment (*Dis-pache*) drawn up without delay. If he acts contrary to this duty, he makes himself answerable to each contributor.

If the drawing up of the adjustment is not done with proper dispatch, each contributor is entitled to bring it under notice and urge on its completion.

§ 729. Im Gebiete dieses Gesetzbuchs wird die Dispache durch die ein- für allemal bestellten oder in deren Ermangelung durch die vom Gericht besonders ernannten Personen (Dispach-eure) aufgemacht.

Jeder Betheiligte ist verpflichtet, die zur Aufmachung der Dispache erforderlichen Urkunden, soweit er sie zu seiner Verfügung hat, namentlich Chartepartien, Conossemente und Facturen, dem Dispacheur mitzutheilen.

§ 730. Für die von dem Schiff zu leistenden Beiträge ist den Ladungsbetheiligten Sicherheit zu bestellen, bevor das Schiff den Hafen verlassen darf, in welchem nach § 727 die Feststellung und Vertheilung der Schäden zu erfolgen hat.

§ 731. Der Schiffer darf Güter, auf denen Havereibeiträge haften, vor Berichtigung oder Sicherstellung der letzteren (§ 615)(i), nicht ausliefern, widrigenfalls er, unbeschadet der Haftung der Güter, für die Beiträge persönlich verantwortlich wird.

(i) § 615. Der Verfrachter ist nicht verpflichtet, die Güter früher anzuliefern, als bis die darauf haftenden Beiträge zur grossen Haverei, Bergungs- und Hülfskosten und Bodmereigelder bezahlt oder sichergestellt sind.

Ist die Verbodmung für Rechnung des Rheders geschehen, so gilt die vorstehende Bestimmung unbeschadet der Verpflichtung des Verfrachters, für die Befreiung der Güter von der Bodmereischuld noch vor der Auslieferung zu sorgen.

§ 729. Within the scope of this Code adjustments are to be made out by persons irrevocably appointed for the purpose, or in the absence of such by persons specially named by the Court (*Dispacheurs*).

Every party interested is bound to communicate to the adjuster the documents requisite for this purpose, especially charter-parties, bills of lading, and invoices.

§ 730. For the contribution due from the ship security is to be given to the parties interested in the cargo, before the ship can leave the port in which, under § 727, the settlement and apportionment of the losses are to be made.

§ 731. The master must not deliver up goods liable to average contribution before payment of or security given for the same (§ 615)(i), otherwise, without prejudice to the liability of the goods, he becomes personally answerable for the contributions.

(i) § 615. The shipowner is not bound to give delivery of the goods until the contributions attaching thereto for general average, cost of salvage and assistance, and money borrowed on bottomry, have been paid or secured.

If the bottomrying has been on account of the shipowner, the preceding regulation is without prejudice to the liability of the shipowner to see to the releasing of the goods from the bottomry debt before the discharge.

Hat der Rheder die Handlungsweise des Schiffers angeordnet, so kommen die Vorschriften des § 512, Abs. 2, 3 (*k*) zur Anwendung.

Das an den beitragspflichtigen Gütern den Vergütungsberechtigten zustehende Pfandrecht wird für diese durch den Verfrachter ausgeübt.

Die Geltendmachung des Pfandrechts durch den Verfrachter erfolgt nach Massgabe der Vorschriften, die für das Pfandrecht des Verfrachters wegen der Fracht und der Auslagen gelten.

§ 732. Hat der Schiffer zur Fortsetzung der Reise, jedoch zum Zweck einer nicht zur grossen Haverei gehörenden Aufwendung, die Ladung verbodmet oder über einen Theil derselben durch Verkauf oder durch Verwendung verfügt, so ist der Verlust, den ein Ladungsbetheiligter dadurch erleidet, dass er wegen seiner

If the master's mode of action has been directed by the owner, the regulations of the second and third paragraphs of § 512 (*k*) come into operation.

The lien which the parties entitled to contribution have against the contributors is exercised on their behalf by the shipowner.

The exercise of this lien by the shipowner is governed by the provisions which regulate the lien of the shipowner for freight and disbursements.

§ 732. If the master, for the prosecution of the voyage, but for the purpose of an expenditure not belonging to general average, has bottomried the cargo, or has disposed of a part thereof by sale or by using it, in that case the loss which a proprietor of cargo may sustain from the circumstance that his claim for compensation against

(*k*) § 512. Diese Haftung des Schiffers besteht nicht nur gegenüber dem Rheder, sondern auch gegenüber dem Befrachter, Ablader und Ladungsempfänger, dem Reisenden, der Schiffsbesatzung und demjenigen Schiffsgläubiger, dessen Forderung aus einem Creditgeschäft (§ 528) entstanden ist, insbesondere dem Bodmereigläubiger.

Der Schiffer wird dadurch, dass er auf Anweisung des Rheders gehandelt hat, den übrigen vorgenannten Personen gegenüber von der Haftung nicht befreit.

Durch eine solche Anweisung wird auch der Rheder persönlich verpflichtet, wenn er bei Ertheilung derselben von dem Sachverhältniss unterrichtet war.

(*k*) § 512. This liability of the master exists, not only as towards the owner, but likewise as towards the charterer, shipper, and consignee, the passenger, the crew, and that creditor of the ship whose claim has arisen out of a credit transaction (§ 528), and particularly the lender on a bottomry.

The master is not freed from liability, as towards the above-named persons, by the circumstance that he has acted under the directions of the owner.

By giving such directions the owner likewise becomes personally answerable, if at the time of giving them he was informed of the position of affairs.

Ersatzansprüche aus Schiff und Fracht gar nicht oder nicht vollständig befriedigt werden kann (§§ 540, 541, 612) (L), von sämtlichen Ladungsbetheiligten nach den Grundsätzen der grossen Haverei zu tragen.

Bei der Ermittlung des Verlustes ist in dem Verhältniss zu den Ladungsbetheiligten in allen Fällen, namentlich auch im Falle

the ship and freight cannot be satisfied or completely satisfied (§§ 540, 541, 612) (L), is to be borne by all the parties interested in the cargo according to the principles of general average.

In adjusting the loss, the rates of compensation laid down in § 711 are, as between the parties interested in the cargo, to be fol-

(L) § 540. Liegt der Fall einer grossen Haverei nicht vor, so ist der Schiffer zur Verbodmung der Ladung oder zur Verfügung über Ladungstheile durch Verkauf oder Verwendung nur befugt, wenn er dem Bedürfniss auf anderem Wege nicht abhelfen kann, oder wenn die Wahl eines anderen Mittels einen unverhältnissmässigen Schaden für den Rheder zur Folge haben würde.

Auch in diesen Fällen kann er die Ladung nur zusammen mit dem Schiff und der Fracht verbodmen. (§ 680, Abs. 2.)

Er hat die Verbodmung vor dem Verkauf zu wählen, es sei denn, dass die Verbodmung einen unverhältnissmässigen Schaden für den Rheder zur Folge haben würde.

§ 541. Die Verbodmung der Ladung oder die Verfügung über Ladungstheile durch Verkauf oder Verwendung wird in den Fällen des § 540 als ein für Rechnung des Rheders abgeschlossenes Creditgeschäft (§§ 528, 754, No. 6) angesehen.

§ 612. Die Vorschriften des § 611 finden auch auf diejenigen Güter Anwendung, für welche der Rheder nach § 541 Ersatz leisten muss.

Uebersteigt im Falle der Verfügung über die Güter durch Verkauf der Reinerlös den im § 611 bezeichneten Preis, so tritt an Stelle des letzteren der Reinerlös.

(L) § 540. If the case is not one of general average, the master is not authorized to bottomry the cargo, or to dispose of any part of it by sale or by using it,* unless the need for funds cannot be met in any other way, or unless the choice of some other means would lead to a disproportionate loss to the shipowner.

Even in these cases he can only bottomry the cargo conjointly with the ship and freight. (§ 680, par. 2.)

He must resort to bottomry in preference to sale, even though the bottomrying should lead to a disproportionate loss for the shipowner.

§ 541. The bottomrying of the cargo, or disposing of a part thereof by sale or using it, is to be regarded, in cases within § 540, as a loan transaction concluded on behalf of the shipowner (§ 528 and § 754, No. 6).

§ 612. The provisions of § 611 are likewise applicable to those goods for which the shipowner, under § 541, must make compensation.

If in the case of disposing of goods by sale the net proceeds of them shall exceed the value indicated in § 611, the net proceeds take the place of the latter.

* *E.g.*, in the way of barter, or giving it in kind for salvage, or by expending specie belonging to the cargo.

des § 612, Abs. 2, die in § 711 bezeichnete Vergütung massgebend. Mit dem Werthe, durch welchen diese Vergütung bestimmt wird, tragen die verkauften Güter auch zu einer etwa eintretenden grossen Haverei bei (§ 718).

§ 733. Die in den Fällen der §§ 635 (*m*), 732 zu entrichtenden Beiträge und eintretenden Vergütungen stehen in allen rechtlichen Beziehungen den Beiträgen und Vergütungen in den Fällen der grossen Haverei gleich.

lowed in all cases, particularly in the case of § 612, par. 2. Upon the value by which this compensation is fixed, the goods sold contribute likewise towards any general average that may occur (§ 718).

§ 733. The contributions to be paid and the indemnifications to be allowed in cases within §§ 635 (*m*) and 732 correspond in all legal relations with the contributions and indemnifications in cases of general average.

SECTION 4.—REGULATIONS AS TO THE PAYMENT OF FREIGHT.

§ 580. Before a voyage has been commenced, whether it be a single or a compound voyage, the charterer may withdraw from the contract on paying one-half of the stipulated freight as dead-freight. In applying this provision, the voyage shall be considered as having commenced—1, When the charterer has already given the master his sailing orders; 2, When the charterer has already delivered the cargo wholly or in part, and the lay-days have expired.

m) § 635. Muss das Schiff, nachdem es die Ladung eingenommen hat, vor Antritt der Reise in dem Abladungshafen oder nach Antritt derselben in einem Zwischen- oder Nothhafen in Folge eines der in § 629 erwähnten Ereignisse liegen bleiben, so werden die Kosten des Aufenthalts, auch wenn die Erfordernisse der grossen Haverei nicht vorliegen, über Schiff, Fracht und Ladung nach den Grundsätzen der grossen Haverei vertheilt, gleichviel ob demnächst der Vertrag aufgehoben oder vollständig erfüllt wird. Zu den Kosten des Aufenthalts werden alle im § 706, No. 4, Abs. 2, aufgeführten Kosten gezahlt, diejenigen des Ein- und Auslaufens jedoch nur, wenn wegen des Hindernisses ein Nothhafen angelaufen ist.

m) § 635. If the ship, after it has taken in the cargo, is necessarily detained, either before entering on the voyage in the port of loading, or subsequently at an intermediate port or port of refuge, in consequence of any of the occurrences mentioned in § 629, in that case the expenses of her stay, even though the requisites of a general average are not present, are to be divided over ship, freight, and cargo, according to the principles of general average, no matter whether the contract is thereby put an end to, or is completely fulfilled. As expenses of the stay are to be accounted all those enumerated in § 706, No. 4, par. 2; those of the going in and out, however, only in the case where a port of refuge has been entered on account of the hindrance.

§ 582. After the voyage has been commenced, within the meaning of § 580, the charterer can only withdraw from the agreement and demand the unloading of the goods on paying the full freight, as well as all other claims of the shipowner (§ 614) (*n*), and on paying or securing the claims mentioned in § 615 (*o*). In case of such unloading, the charterer shall not only pay the additional expenses thereby incurred, but also indemnify the shipowner for the loss caused by the delay. The shipowner is not bound to alter the voyage or to put into a port for the purpose of unloading the goods.

§ 616. The shipowner is not obliged to accept the goods in payment of the freight, whether they are destroyed or damaged or not. When, however, vessels filled with liquids have leaked during the course of the voyage to such an extent that they have become altogether or for the most part empty, they may be left to the shipowner in payment of the freight and of his other claims (§ 614).

§ 617. No freight is due for goods lost by any accident; and any freight advanced shall be returned, unless an agreement to the contrary has been made.

§ 630. The contract of affreightment is terminated when, after the commencement of the voyage, the vessel is lost by an unforeseen incident (§ 628, par. 1, No. 1) (*p*). The charterer shall, however, pay such proportion of the freight for the goods saved or rescued as the part of the voyage actually performed bears to the entire voyage (distance freight). No claim for distance freight shall exceed the value of the goods saved.

§ 631. In the calculation of the distance freight there must be taken into consideration not only the proportion of the distance already per-

(*n*) § 614. By taking delivery of the goods, the consignee becomes liable to pay the freight and all other charges in conformity with the contract of affreightment or bill of lading, on the basis of which the delivery is made; and, further, to pay demurrage, if any, to refund customs' duties and other advances, and to fulfil any other obligations devolving upon him. The shipowner shall deliver the goods to the consignee on payment of the freight and on fulfilment of all other obligations.

(*o*) § 615. The shipowner is not bound to deliver the goods before the amounts due from the same for general average, salvage, assistance, or bottomry, have been paid, or security given for the amount. If a bottomry bond has been given for account of the shipowner, the above regulation holds good in spite of the shipowner's obligation to free the goods from their liability to the bottomry before they are delivered.

(*p*) § 628. The contract of affreightment is at an end, and neither party is bound to indemnify the other, if, before the commencement of the voyage, and through an unforeseen incident, the vessel is lost; particularly, if it is lost by accident; if it has been condemned as irreparable or not worth repairing (§ 479), and if, in the latter case, it is sold without delay by public auction; if it is captured by pirates: if it is seized or detained, and condemned as good prize.

formed to that still to be completed, but likewise the comparative proportion of expenditure in cost, time, danger, and labour ordinarily connected with the part of the voyage already performed, as compared with that still to be completed.

§ 632. Par. 1. The dissolution of the contract of affreightment makes no alteration in the obligation of the master to take care of the cargo in the absence of the parties interested, even after the loss of the vessel (§§ 535—537) (*q*). The master is, therefore, justified and obliged, and in urgent cases even without previous enquiry, as circumstances may require, either to forward the cargo to the port of destination in another vessel for account of the parties concerned, or to have it stored and sold; and, in case of its being forwarded or stored, to sell a portion thereof for the purpose of realizing the funds necessary therefor and for its preservation, or, in case of its being forwarded, to take a bottomry bond on the whole or a part of it. Par. 2. The master is, however, not obliged to part with the cargo, or to deliver it to another master for the purpose of its being forwarded, unless the distance freight as well as all other claims of the shipowner (§ 614), and the contributions due from the cargo for general average, salvage, and assistance and bottomry, have been paid or secured.

The shipowner is responsible for the fulfilment of the duties devolving on the master, according to the first paragraph of this article, to the extent of the value of the ship, so far as anything has been saved of it, and of the freight.

(*q*) § 535. The master shall take every possible care of the cargo during the voyage in the interest of those concerned in it. When special measures are required in order to avoid or lessen a loss, it is his duty to protect the interest of those concerned in the cargo as their representative; to take their instructions if possible, and, so far as circumstances admit, to carry the same into effect; otherwise, however, to act according to his own discretion, and generally to take every possible care that those interested in the cargo are speedily informed of such occurrences, and of the measures thereby rendered necessary. He is specially authorized in such cases to discharge the whole or a portion of such cargo; in extreme cases, if on account of imminent deterioration or for other causes, a considerable loss cannot otherwise be averted, to sell or hypothecate it for the purpose of providing means for its preservation and further transport; to reclaim it in case of capture or detention; and, if it shall have been otherwise withdrawn from his charge, to take all judicial and extra-judicial steps for its recovery.

§ 536. When the prosecution of the voyage in its original direction is prevented by an accident, the master is at liberty either to continue the voyage in another direction or to suspend it for a longer or shorter period, or to return to the port of departure, according to circumstances and to the instructions received, which latter are to be adhered to as closely as possible.

§ 537. Even in the cases referred to in § 535, the master has no right to conclude any business transaction upon the personal credit of the parties interested in the cargo, unless by virtue of a power of attorney authorizing him to do so.

SECTION 11.—REGULATIONS AS TO STATUTORY
LIMITATIONS.

According to §§ 901—904, claims against the ship for contributions to general average are only in force for one year. This period of limitation is reckoned from the expiration of the year in which the delivery of the goods has taken place. One year is also the period of limitation for the claims for which the goods are responsible with respect to bottomry loans, contributions to general average, salvage and assistance expenses, as also for all claims arisen out of personal liabilities for these loans, contributions, and expenses.

NOTES.

For convenience of reference, these notes are divided under heads corresponding with the chapters of this book, which set forth the English law on this subject:—

1. *General Principles.* (CHAP. I.)

The provisions of the German Code which fall under this head are contained in §§ 700—703. There is nothing in these provisions requiring comment, except § 703, where it is said that there can be no general average, except when both the ship and the cargo, each either wholly or in part, have actually been saved. This rule leads to results which one may almost say are contrary to common sense. If, for example, a vessel is stranded, and is saved by throwing overboard the whole of her cargo; or is on fire, and saved by being scuttled, the effect of which is to wash out the entire cargo of sugar or salt; or if in time of war a ship with neutral goods on board, having sprung a leak, is run for the common safety into an enemy's port, where the cargo is safe, but the ship condemned—in cases of this kind there is no general average according to the text of the law. The party whose property has necessarily been sacrificed or who has reasonably incurred expenditure, may, however, have a claim to compensation under § 812 of the Civil Law against those whose property has been preserved thereby.

Of the principle that some of each must be saved.

If, after the loss of the vessel, cargo is saved and freight becomes due to the shipowner (§ 630), the salvage is not apportionable between the net value of the cargo saved and the freight earned, the salvage being a prior charge on the cargo and the claim for freight ranking after it (*r*).

(*r*) Judgment of R. G., 1903, *Martha Percival*.

According to German law it is not a condition of general average that the common safety shall have been attained by the sacrifice; it is sufficient that ship and cargo have escaped the danger which caused the sacrifice to be made.

Definition of danger.

Though danger is a necessary condition of general average, it need not have been a real one. The condition is complied with, when the circumstances are such as to justify a master of reasonable judgment in assuming that the vessel and cargo are in a perilous position (*s*).

Definition of expenses.

Though the text of the law does not expressly provide that expenses, in order to be allowable as general average, must be extraordinary, they cannot be so treated, unless they have been incurred outside the contract of affreightment and for the purpose of preserving ship and cargo from a common danger. It entirely depends upon the circumstances of the case, whether expenses, though ordinarily payable by the shipowner (§ 621), can be treated as general average. For example, the expense of cutting a ship out of the ice is, in the Baltic, an ordinary incident of navigation (*t*); yet if by reason of an accident the ship is unexpectedly caught in the ice, whereby she and her cargo are placed in a position of danger, the cost of cutting her out may properly be general average; and it has been so treated in the German Courts. So the towing of a ship into her port of destination is an ordinary operation; yet if a ship is in danger—*e.g.*, in case she cannot find her way, through the removal of buoys in time of war, or through fog—and is rescued from that danger by a tug which tows her to her destination, the cost of such rescue certainly ought to be general average.

Definition of sacrifice.

Loss or damage is considered to have been incurred voluntarily which, though not absolutely intended by the master, yet was considered by him as possibly resulting from his act or order.

(*s*) See judgment of O. L. G., Hamburg, 1904, *S.S. Björgein*, where it was held that the master who was able to consult the pilot as to the position of his vessel, but omitted to do so, was not justified in assuming that the vessel and cargo were in a perilous position, and was, therefore, not entitled to claim compensation in general average for damage to the engines by floating operations which were unnecessary, the steamer being likely to refloat with the rising tide.

(*t*) See judgment of the A.-G., Hamburg, 1900, *S.S. Hamburg*. The master of this steamer, having for about twenty-four hours been prevented by ice from reaching Reval, and an ice-breaker not being available, finally accepted the assistance of some pilots in order to bring the steamer into port. The shipowner's claim to recover in general average the remuneration of these pilots was rejected by the Court on the strength of § 621, and on the ground that a shipowner who sends a vessel in February to Reval ought to foresee this occurrence, and to take this expenditure into account when fixing the rate of freight.

Consequential losses caused by a general average act comprise such damage and expenses as are the natural and immediate consequence of the sacrifice and may have been foreseen by a master of ordinary foresight, but do not include such damage and expenses as arise from subsequent accidents, though the latter would not have occurred but for the sacrifice. Of consequences of a sacrifice.

The words "by the master or his orders," in § 700, were inserted in order to supersede the antiquated rule that there must first be a consultation with the crew. The captain now has to act alone, and on these occasions has to act promptly; and it was thought better to leave the sole responsibility to him. In his absence, however, the mate, or whoever is in charge of the ship, has the same authority.

Expenditure not incurred by the master or by his orders, but caused by the act of third parties, *e.g.*, by the interference of local authorities, cannot be the subject of general average, except in cases within the provisions of §§ 635, 629. Thus it has been held by the German Courts that expenditure caused to the shipowner by the detention of his ship, owing to her discharge having been stopped for some days by the local authorities at the port of destination, in order to prevent a fire from spreading among the cotton cargo on board, was not recoverable in general average. Even without the interference of the authorities, neither the expenditure connected with the detention of the ship under these circumstances nor the consequent damage to the cargo by fire would have been allowable as general average, both having been due to necessity and not having resulted from a voluntary decision of the master.

Salvage, properly so called, *e.g.*, of a derelict vessel and her cargo, though, strictly speaking, not the subject of general average, is apportioned on the same principles, if the salvage was one complex operation and the amounts payable by each property or interest were not separately fixed.

Notwithstanding the provision of § 702, the shipowner who, by the insertion of the negligence clause in the contract of affreightment, has exempted himself from responsibility for loss or damage resulting from faults or errors of the master and crew in the navigation of the vessel, is neither responsible for the contributions of the other parties to the adventure (cargo-owners) to general average occasioned by such negligence, nor loses his right to claim from them compensation in general average for loss or damage suffered by his own property from the same cause (*u*).

Default of parties to the adventure.

When the general average act has been caused by a fault of the master, for which the shipowner is responsible, *e.g.*, by improper

(*u*) Judgment of R. G., 1905, *S.S. Rossya*.

stowage or loading, the latter is not entitled to recover in general average the loss thereby occasioned to his property (*x*), and will be responsible for any contributions payable by the other parties to the adventure.

2. *Enumeration of the Several Cases of General Average Loss.*
(CHAPS. II. TO V.)

A complete enumeration of general average losses, or one that professes to be complete, is perhaps hardly desirable, since new cases, resulting perhaps from changes in the ways of navigation and of maritime commerce, are constantly arising, for which a completed list might not leave room. Nor does the German Code profess to give such a list, but only a few typical examples. It may be doubted whether it goes far enough, since, for practical purposes, the fuller the list the better, besides which every doubtful case which has been decided is likely to furnish fresh analogies, useful in determining new cases as they arise.

Construction
of the Code.

The enumeration in the Code is contained in §§ 706 and 707. With regard to these articles it has been judicially decided that, although the list is not to be taken as exhaustive, yet, in each of the seven cases provided for in § 706, the list of items admissible is complete in the sense that an item not therein specified is to be taken as excluded. Thus, from the fact that in No. 3 of this Article, which deals with the case of a voluntary stranding, the wages and maintenance of the crew are not mentioned among the items of general average, whereas in No. 4, which deals with putting into a port of refuge, this item is so mentioned, we are justified in concluding that the Code intends in the former case to exclude this item, notwithstanding the natural inference to the contrary which might be drawn by analogy. Again, since in No. 4 the damage done to the cargo in discharging and reloading it is not enumerated, it must be taken as excluded by the Code from general average.

Jettison.

As regards jettison, we learn that the framers of the Code, with the view of leaving the captain perfectly free to act, in the moment of danger, as he may himself think best for the common safety, purposely omitted all those directions which are to be found in other Codes, as, that he should first consult with his crew, that he should begin with ship's materials before touching the cargo, that he should select the heaviest and least valuable goods, and the like; requiring only, of course, that he should act in a reasonable manner.

No allowance can be made for goods which at the time of the

jettison had already become valueless from some accidental cause, nor for goods which were jettisoned owing to their endangering the safety of the ship and the remainder of the cargo, if their dangerous nature, though known to the shipper, had not been disclosed by him to the master.

In a case tried in the Courts, where a ship laden with guano had sprung a leak, owing to which a quantity of the guano had become so saturated with water as to be reduced to a pulpy mass, which by rolling from side to side rendered the ship innavigable, so that some of it had to be thrown overboard, and afterwards the ship was taken for repairs into Valparaiso, where the remainder of this damaged mass, being unfit to be carried on and of no value on the spot, was thrown overboard in port, it was decided that the loss of the portion thus thrown overboard was not admissible in general average. The allowance of the portion jettisoned at sea was not disputed. When ship's materials are thrown overboard from the deck, they are only allowed in general average in case they are properly and customarily carried there, such as the boats, spare spars, and the like; not such as are improperly put there for the occasion, as spare hawsers, provisions, or water, in order to enable the ship to take more cargo below. There seems to be some difference of opinion concerning water-casks. Probably the true rule is the one now generally followed in practice in this country, viz., that a cask or two, enough for the present consumption of the crew, may be carried on deck, as well as a harness cask or two of meat; but that the bulk of the water and provisions should be kept below.

Damage done to a ship in the act of jettisoning deck cargo is to be made good in general average, though the jettison of the deck cargo is not so treated (*y*).

When a deckload has been jettisoned (the jettison not being admissible as general average) and has afterwards been salvaged, the shipowner being entitled to freight thereon, the salvage is not apportionable between the net value of the deckload and the freight earned, but is payable by the deckload alone, the claim for freight ranking after it (*z*).

When a mast has been carried away, the cutting away of the ropes or other remains attaching it to the ship is not under ordinary circumstances treated as general average; but where the wreck of a mast so carried away has become dangerous to the ship, and for that reason has to be cleared away and got rid of, it may, under some circumstances, be right to allow the value of what is thus cut

Cutting away
of wreck.

(*y*) Judgment of O. L. G., Hamburg, 1900, *S. S. Skodsborg*.

(*z*) Judgment of O. L. G., Hamburg, 1905, *S.S. Haparanda*.

away in general average. In practice it is usual, when the wreck might have been saved but for the common danger, but is cut away for the common safety, to allow in general average a sum which, according to the estimate of nautical experts, fairly represents its value as wreck. No allowance is made, however, if it was in any case impossible to save it.

Damage
incidental
to sacrifice.

Of damage incidental to a sacrifice, the following examples may be cited as admissible in general average: Damage done to the deck or boats by the falling of a mast cut away; damage by chafing of the cargo which breaks loose in consequence of the removal of a portion for jettison; and damage done to the cargo by water which gets below while the hatches are open in making a jettison.

Voluntary
stranding.

It is to be noted that the German law does not allow as general average damage caused by a voluntary stranding unless the foundering or the capture of the vessel and her cargo has thereby been avoided, and unless the vessel is subsequently got off and found capable of repair.

Damage done
to get ship
off shore.

In cases of accidental stranding, the practice is as follows:—When sails are set, or are kept set, in order to force the ship off the ground, and are blown away or injured in consequence, this damage is treated as general average. When a steamer is on shore, and in order to back her off or force her over the bank into deep water, the engines are kept working, and thereby the machinery is strained or injured, or the propeller broken, *e.g.*, by reason of its working in shallow water or among rocks, such damage, and likewise the cost of the coal consumed during such working, are treated as general average.

Port of refuge
expenses.

As to port of refuge expenses, a putting into port merely on account of contrary winds, or to avoid delay through ice, and in general where there is no imminent danger threatening ship and cargo in case she remains at sea, is not to be treated as general average. In determining what is such danger as justifies putting in, account is to be taken of the character of the ship and voyage. Ice, such as would be no obstacle to a North Sea whaler, might be dangerous enough to an ordinary vessel.

Except in the case provided for in §§ 635, 733, the expenses consequent on a detention are not the subject of general average when the vessel has been detained at the port of loading or call, unless the repairs to be effected there have been necessitated by a general average sacrifice or the vessel has returned thither in distress.

Where a ship, bound for Stettin, was carried by the master into Helsingör, in order to avoid risk of capture, on his hearing that war had broken out between France and Germany, and that Stettin was blockaded by the enemy, and was detained at Helsingör about two months, the expense of putting in and of the detention was treated

by the Courts as general average; and it was held to be sufficient that the blockade had been notified, whether by the law of nations it were a regular blockade or not. So, where a declaration of war took place shortly before the completion of a ship's loading at Antwerp, and the master, after completing his loading, remained for some three months in port, fearing capture if he sailed, it was held by a court in Hamburg that, under § 635 of the Code, the expense of this detention must be treated as if it were general average, whether the cargo were free or liable to condemnation after capture with the ship.

The wages and maintenance of the crew, during the time occupied at sea in bearing up for a port of refuge, are not, like the wages and keep in port, allowed in general average; neither are the engine-room-stores consumed in bearing away for the port of refuge, and *vice versâ*, allowable. This follows from the rule laid down by the Courts, that an item not specified in each of the cases enumerated by § 706 is to be taken as excluded from general average.

If, after the cargo has been reshipped and the ship is ready for sea, she is detained in the port of refuge in consequence of storm or ice, the wages and keep of the crew during this supplementary detention are not allowable as general average.

It has been decided in the Courts that, when a ship has put into a port of refuge for repair of accidental damage, the cost of employing divers to discover the extent of damage, so as to determine whether it is necessary to discharge cargo, belongs to general average (*a*).

If the master at a port of refuge, instead of taking steps with regard to the execution of repairs on his own authority, deems it necessary to wait for the arrival of the owner's special representative, the delay thus occasioned is not to be counted as part of that detention during which the wages and maintenance of the crew are allowable as general average (*b*).

The costs incurred on behalf of the ship or the cargo, whilst the ship is in a port of refuge, are admissible as general average only for the period during which the original motive, which led to the putting in, remains operative. As soon as this original cause ceases to operate, the allowance ceases also, notwithstanding that some other cause may delay the ship's putting to sea again. If, therefore, a ship, which has run in for repairs, has been repaired, but meanwhile has been frozen in and obliged to winter at the port of refuge, it has been decided, that the wages and maintenance

Expenditure
in port of
refuge not
occasioned by
the motive for
putting in.

(*a*) Judgment of H. G., Hamburg, 1881, *Prince Eugene*.

(*b*) Judgment of H. O. L. G., Hamburg, 1881.

subsequently to the completion of the repairs are not admissible as general average. So, if a ship is condemned as not worth repairing in the port of refuge, and the cargo, which has been landed, is forwarded in another ship, while the cost of discharging and storing the cargo are allowable as general average, the wages and maintenance of the crew and the storage charges incurred after the condemnation of the vessel or the abandonment of the voyage are not so treated, this being the moment when the community of interest between ship and cargo ceases.

Damage
to cargo.

Damage to cargo resulting from discharging or storing it at the port of refuge is not enumerated in the Code among the items admissible as general average. The Courts have given two contradictory decisions under this head:—The ship *Celestine*, carrying rock salt from Torrevieja to Memel, sprang a leak in a storm, and put for repair into Cadiz, where the cargo was discharged and placed on the ground, where it remained during the repairs for about seven weeks. On arrival at Memel, its port of destination, the rock salt was found to be in an unmerchantable condition, being dusty, mud-stained, and broken; a great part of which loss resulted from the exposure after landing. The question arose whether this loss was allowable as general average; and the Court decided that it was not. The reason given was, that intentional damage either to ship or cargo is a necessary condition of general average; but here, where a ship-master, on account of particular average damage, enters a port of refuge for repair, and for this purpose lands and stores the cargo, he does not intend the sacrifice or damage of the cargo, but, on the contrary, its preservation. On the other hand, it appears from the decision of the Court in Hamburg, that a loss of quantity in the cargo, *e.g.*, guano, resulting from its discharge and reloading at a port of refuge, is properly admissible in general average. A distinction between loss in quality and loss of quantity is plainly untenable, and in practice, damage necessarily caused by discharging and reloading cargo or loss in handling cargo in bulk, *e.g.*, the damage or loss caused by breakage of coals or by spilling grain, is treated as general average.

Fire—insur-
ance of cargo.

There is no settled practice with regard to the allowance of the premium of fire insurance on cargo, landed and stored in the port of refuge, some adjusters allowing it as a general average charge, some treating it as a special charge on cargo.

Temporary
repairs.

The cost of repairing particular average damage at a port of refuge is borne by the ship alone, even though it may greatly exceed the cost of such repairs at the port of destination. In cases, however, where mere temporary repairs are made, so as to avoid the necessity for discharging the cargo to make complete repairs, it was the

practice in most of the German ports to bring these temporary repairs, so far as they were of no permanent value to the ship, into general average. This practice, however, was set aside by the following decision of the Hanseatic Supreme Court:—The ship *Prince Eugene*, owing to a great wave following upon an earthquake, was driven ashore on the south coast of Peru, near Pabillon de Rieu. At this place she could not be repaired, and she was therefore taken for that purpose to Callao. Here her bottom was examined by divers, and it was resolved, instead of repairing her completely at Callao, which would have necessitated the discharge of the cargo and a large consequent general average expense, merely to make, by means of divers, certain temporary repairs, such as the patching of her copper and the repairing of her damaged rudder. With these repairs she sailed on her voyage, and arrived safely at her destination. The temporary repairs were of no permanent value to the ship, all the new material having to be stripped off when she came to be finally repaired after arrival. The shipowner contended that the temporary repairs at Callao were allowable as general average, on the ground that they were an expense incurred to prevent a greater general average expenditure. The Court, however, decided against the claim. This argument, it was said, was not founded on the proper point of view. The master of a ship, when he has to choose between two courses, with the view of restoring his damaged ship to a proper condition for completing her voyage, is bound to adopt that one which he, as a reasonable man, after taking advice, deliberately considers to be, under the circumstances, the best adapted for that purpose. If, therefore, in the case under consideration, the damage to the hull of the ship was so inconsiderable that the ship could safely proceed to sea after merely patching up the hull by means of divers, the master would be acting contrary to his duty, were he to go to the expense of discharging the cargo to effect complete repairs at Callao. It could not, in such a case, be said that the discharge of the cargo was a necessary consequence of the cause (*Grunā*) which justified putting into Callao, and, therefore, if the cargo had been discharged, the cost of doing so would not properly have been general average. These temporary repairs, then, must be treated as particular average on the ship (*c*). This judgment is, however, not uniformly acted upon in practice, some adjusters admitting as general average the cost of temporary repairs in a port of

(c) Judgment of O. L. G., Hamburg, 1881, *Prince Eugene*. It is interesting to note that this judgment, and the reasoning it is based on, exactly correspond with the judgment of Blackburn, J., in *Wilson v. Bank of Victoria*, L. R. 2 Q. B. 203: 36 L. J. Q. B. 89.

refuge necessary for the safe prosecution of the voyage up to the amount of the expenditure (*e.g.*, cost of discharging, storing, re-loading cargo, wages and maintenance of crew) saved thereby, which would have been the subject of general average, if the repairs had been done permanently.

Defence
against enemy
or pirate.

With regard to the damage done to the ship, and compensation to the crew for injuries sustained, and meritorious service rendered, in defending the ship against an enemy or pirate, the German rule is more reasonable than that which prevails in England and the United States. There it was laid down long ago by the Courts, as we have seen, that the master and crew who resist and beat off a hostile attack have done no more than their duty, and therefore deserve no reward. Still, it may be politic to encourage such exertions by a liberal recognition of them. The master does no more than his duty in cutting away his mast, when the ship has, by an accident, been placed in a situation where nothing else can prevent a total loss; still, we make compensation for this. If, in the case of an armed cruiser, or even of a ship carrying letters of marque, fighting an enemy might in time of war be regarded as an ordinary incident of navigation—though even then it is not more so than a gale of wind—yet the seaman on board an unarmed merchantman might well plead that he was hired to navigate the ship, not to fight, and that if injured in performing the latter service he deserved some compensation.

Special agents
sent out.

The cost to the owner of sending out a special agent to assist, direct, or overrule the master in any special emergency is usually not allowed in general average, unless the necessity of this measure, for the common benefit of ship and cargo, has been justified by very strong reasons. The master, it is generally held, ought to be competent to exercise his proper authority without such assistance.

Damage in
extinguish-
ing fire.

Damage done to ship or cargo in extinguishing a fire, though not mentioned in the Code, is the subject of general average, even with regard to such packages as were already on fire, the compensation in general average being, however, restricted to the damage done by water alone, or to such value as the burning packages still have when the fire has been extinguished. In the case of *The Alida Margaretha*, where a fire on board a ship laden with bags of guano was extinguished by pouring down water, the damage by water to the bags, that had already caught fire, was recognized as one of the items admissible as general average; and this, notwithstanding that the fire broke out in the cargo itself, apparently from spontaneous combustion. In another case decided by the Courts, the damage done by water to cotton on fire, which had been extinguished partly in the ship's hold and partly by throwing the bales overboard, was allowed in general average.

The expenses of raising the money required during the voyage to cover general average disbursements include a commission to the shipowner who advances such funds and the premium of insuring such disbursements, whether the shipowner has taken out a policy or whether he has run the risk on his own account (*d*). Expense of raising funds.

As to the allowance of interest on general average disbursements during the voyage and on the compensation for property sacrificed, there is no uniform practice among the adjusters.

The exclusion of the costs of reclamation—that is to say, of resisting condemnation after capture and so obtaining restoration of the ship and cargo to their owners—is explained by the consideration that these expenses are not incurred in the interest of the parties jointly, but for each severally; the cargo may be successfully reclaimed as neutral property though the ship be condemned as prize; and even if the suit be carried on jointly, and may be successful as to both, yet the proportion of the expenses properly falling on each may not be in the ratio of their respective values, since there may be great labour and expense incurred in reclaiming a ship of little worth, while a very valuable cargo may be reclaimed at much less actual cost. The same principle evidently applies to the cost of a joint salvage suit. Cost of legal proceedings.

Concerning press of sail—that is, the damage done to a ship or her tackle by carrying a greater press of canvas, in order to bear off a lee shore in a gale of wind or to escape the pursuit of an enemy, than it would be safe or proper for the ship to carry under ordinary circumstances—at the conferences which preceded the drafting of the Code, it was proposed on behalf of Prussia that such damage, whether to the ship or to the cargo, by the consequent leakage, should be treated as general average. This, however, was rejected after discussion, on the ground that it was no more than the ordinary duty of the shipowner under his contract of *afireightment* to use all the ordinary appliances of the ship towards the safe prosecution of the voyage, whether it be by putting a greater or less strain upon them. This argument was reinforced by the somewhat obvious consideration of the practical abuses towards which a contrary rule must tend, since it would be easy for a shipmaster who had lost his sails or sprung a leak in bad weather to make out a plausible ground for alleging that on account of some danger he had been obliged to carry a press of sail at some time or other. Carrying press of sail.

Jettison of deck-cargo gives no claim to contribution, even as between the shipowner and a shipper who has consented to that mode of stowage. The German law also goes beyond the English Deck-load jettison.

in not allowing contribution in trades, such as the timber trade between Great Britain and her colonies, in which the carrying of a deckload is sanctioned by custom, excepting only the coasting trade, so far as therein the carrying of deckloads is permitted by any of the German States—an exception which is nugatory, since none of those States permits it. Cargo in the poop or deckhouses is treated as if under deck, provided the poop or such houses are built in with, so as to form part of, the hull of the ship; otherwise, as in the case of mere temporary erections on deck, the cargo is treated as if on deck.

3. *Mode of Adjustment.* (CHAPS. VIII. TO X.)

The directions of the Code with regard to the mode of adjustment are so full and explicit, that every ordinary case seems to be provided for.

Estimates of
repairs.

One peculiarity which distinguishes this Code from most others, is that, instead of taking as the basis of compensation the actual cost of the repairs, it takes an estimate made by surveyors. The motive avowedly is, to guard against the frauds, overcharges, and falsified accounts, which are sometimes detected, and much oftener suspected, in connection with such claims. It may be doubted, however, whether the remedy is not worse than the disease: an estimate, after all, is but an imaginary quantity; and in some cases, *e.g.*, in the repair of the framework or machinery of an iron ship or steamer, the best estimate in the world is a very uncertain test of the actual cost of the work to be done. Strictly speaking, an estimate is a prophecy, and the safest prophecies are those made after the event, as these estimates occasionally are.

The German rules for adjustment are substantially the same as the English. Some peculiarities may, however, be mentioned:—

Deductions.

The provisions of § 710 with regard to deductions from the cost of repairs are antiquated, and have largely contributed to make the introduction of the York-Antwerp Rules agreeable to shipowners.

Dates for
fixing contri-
butory values.

In determining the values on which the cargo is liable to contribute, or on which damage to or loss of cargo is to be made good, the law fixes, in §§ 711, 712, 718, 719, the point of time throughout at the first day of the discharge, even if the adventure ends short of the destination. The same provision applies to the assessment of the contributory value of the ship (§ 717). This principle is carried so far that in the event of the voyage being broken up at an intermediate port, and an article liable to contribute getting lost or diminishing in value in the interval between the commencement of the discharge and the abandonment of the voyage, the general average is apportioned over the values which were existing at the

commencement of the discharge, the party claiming compensation losing the irrecoverable contribution (§ 724, sect. 2).

Goods which, in order to lighten the ship, have under circumstances constituting a general average been temporarily discharged into lighters (§ 706), contribute even to a subsequent general average loss of the ship. Contribution of goods.

Goods, however, which have been discharged and stored in a port of refuge, do not contribute to a subsequent general average loss occurring to the ship and to the remainder of cargo still on board while in the port of refuge.

Valuables (specie, ingots, metal or paper money, or other articles having an intrinsic value) shipped under a mail contract have been held liable to general average contribution, though the Court admitted that the enforcement of the liability will in most cases be impracticable, and recommended an alteration of the law (*e*).

When the circumstances do not render the valuation of a vessel for general average contribution impracticable without a survey of the vessel in dry-dock, the shipowner is not entitled to claim the dry-dock expenses in general average, on the plea that these expenses were necessarily incurred for sighting the bottom in connection with the valuation of the vessel (*f*). Dry-dock expenses.

The freight, whether at the risk of the shipowner or whether wholly or partly advanced and at the risk of the charterer, contributes on two-thirds of the gross amount earned or made good in general average. Freight.

Freight prepaid and earned, vessel and/or goods lost or not lost, is no longer a separate interest in freight within the meaning of § 721, but is involved in the value of the goods. Such freight is, therefore, not subject to deduction.

If the contract of affreightment is governed by German law, there can be no loss of freight in general average, except when goods are sacrificed (or sold to defray a general average expenditure). No freight is lost, the shipowner being entitled to distance-freight, if the voyage is broken up short of the destination (§ 630), even when the abandonment of the voyage has been caused by a general average act. No freight is lost, the shipowner being entitled to full freight, when goods are sold on account of damage at an intermediate port and the vessel completes her voyage with the remainder of the cargo.

The proper place for adjusting the general average is the port of destination, if the ship and cargo reach it, otherwise the place at Place and mode of adjustment.

(*e*) Judgment of O. L. G., Hamburg, 1911, *S.S. Goeben*.

(*f*) Judgment of O. L. G., Hamburg, 1900, *S.S. Louise*.

which they part company. The adjustments (*Dispachen*) are drawn up by qualified persons (*Dispacheure*), who are appointed either by the local Chambers of Commerce (as in Prussia) or by the Government (as in Hamburg, Bremen, and Lübeck). In Hamburg adjustments are made up, not only by the official *Dispache-Comptoir*, but also by private individuals. The rules of procedure for giving validity to an adjustment which were in force under the old law, especially in Prussia, have been abolished, a confirmation or homologation by the Court no longer being required. Certain powers of adjudication on the duty of an adjuster to prepare an adjustment or on disputes arising out of adjustments have been conferred on the *Amtsgerichte*; application to these courts being, however, not obligatory, and ordinary proceedings at law being generally preferred for the settlement of disputes. These rules are not reproduced here (*g*).

Liability of consignee.

A consignee is not personally liable for the contributions attaching to the goods delivered to him, unless, at the time of the delivery, he was cognisant or had been notified of a general average claim being in abeyance.

Security for claims.

Whoever is entitled to compensation in general average has a lien on the contributing property, which, with regard to the contributions due from the cargo, is exercised by the master, who, therefore, in order to avoid personal liability, must not part with the cargo before proper security for its share of the general average has been obtained. When the shipowner has only to consult his own interest, or the amount at stake is inconsiderable, he, instead of collecting deposits, is usually content to take an average-bond, signed by the consignees. On the other hand, consignees having general average claims are entitled to security from the ship before she leaves the place where the adjustment is to take place.

The master of the ship is bound to have the adjustment of general average made up without delay, and, in connection with this duty, attention is called to the statutory rules of limitation. (See page 545.)

Inland navigation.

The provisions of the maritime law do not apply to vessels employed in the navigation on the German inland waterways, an Act having been in force since 1895 which contains special regulations as to the carriage of goods on such vessels, also with regard to general average (*h*).

(*g*) See Reichsgesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit vom 17 Mai, 1898, §§ 149—158.

(*h*) See Gesetz betr: die privatrechtlichen Verhältnisse der Binnenschifffahrt und der Flösserei vom 15 Juni, 1895.

Apart from legal decisions on the application of Rule VII., the Y.-A. Rules. cases in which German Courts of Law had to adjudicate upon the interpretation of York-Antwerp Rules are not numerous. Some decisions may be cited here:—

Damage done to the vessel by jettison of a deckload is admissible in general average, even when the jettison is not so made good.

Damage, which the cargo has accidentally suffered while being stored on land at the port of refuge, is not admissible in general average. (In that case the goods had become rusty and the origin of the oxidization was not clearly established.)

The shipowner is entitled to contribution for damage to the ship due to a fault of the master in the navigation of the vessel, when the contract of affreightment contains the negligence clause.

Damage done to machinery and boilers of a steamer in endeavouring to extricate her from a position of peril caused by ice is admissible in general average (as under Rule VII.) (i).

These notes are a revision of the comments on German Law contained in the former editions of this work, for which the editors are indebted to Mr. Oscar Schwarz, Average-Adjuster of Bremen. For fuller information on the subject, the reader is referred to such treatises as Boyens, "The German Maritime Law"; Dr. Georg Schaps, "The German Maritime Law"; Heck, "The Law of General Average"; Ulrich, "On General Average," and others.

(i) Judgment of O. L. G., Hamburg, 1908, *S.S. Eros*.

APPENDIX K.

THE LAW OF GREECE.

The provisions of the Law of Greece which deal with general average constitute the Fifth Part of the Maritime Code, which was enacted on the 17th April, 1910, and came into force on the 1st July, 1910. The following is a translation of this part of the Code:—

Art. 193. By average is understood all extraordinary expenses incurred on account of the vessel and the cargo, jointly or separately, and all damage that may happen to the ship and the cargo after the loading and departure until the arrival and unloading.

There are two kinds of average: general average and particular average.

The usual expenses of entering and leaving harbours, rivers, or canals, and navigation dues, are not average, but merely expenses to be borne by the vessel.

When there is no special agreement between the parties, averages are regulated by the following provisions:—

Art. 194. By general average is understood all extraordinary expenses and voluntary damage, having for their object the common benefit and preservation of the ship and cargo. Such are:—

- (1) All things given for the ransom of the ship and cargo.
- (2) All things thrown overboard for the general preservation.
- (3) The cables, masts, sails, and other apparel cut away for the general preservation, also those broken in the course of the operations effected for the general preservation.
- (4) The anchors, chains, and other articles abandoned for the common safety.
- (5) Damage occasioned by jettison to the goods remaining in the vessel.
- (6) Damage occasioned to the ship, either voluntarily or necessarily, by jettison, and damage occasioned to the ship in order to facilitate the preservation of the cargo, or to assist in the pumping out of the water, and all damage occasioned to the cargo.

- (7) Damage occasioned to the ship and cargo by reason of the operations for extinguishing fire occurring in the ship.
- (8) The expenses for medical treatment and maintenance of the seamen wounded in defending the ship, and all their funeral expenses in case of death.
- (9) The wages and maintenance of the crew during the detention of the ship, when the vessel is arrested by order of a sovereign Power, or is obliged to remain in a port on account of a war breaking out, or of other similar cause preventing the ship from sailing for its destination, as long as the ship and cargo have not been released from their respective obligations.
- (10) The expenses of entering and leaving a harbour, as also harbour dues, when the ship is compelled to enter by stress of weather, or the pursuit of an enemy or of pirates, or on account of a leak occasioned by accident or *force majeure*.
- (11) The wages and maintenance of the crew whilst compelled to remain in the harbour during the time of the repairs to the vessel necessary for the continuation of the voyage, when these repairs fall under the head of general average.
- (12) The expenses of unloading and reloading articles taken ashore for the execution of the above-mentioned repairs during a compulsory stay in a harbour, the expenses of their safe custody and the rent of warehouses where the goods have been deposited.
- (13) The expenses incurred for the release and ransom of the detained ship, if the detention was not due to reasons only affecting the ship, or the captain or shipowner, also the wages and maintenance of the crew during the delay necessary for such release and ransom of the ship, if obtained.
- (14) The expenses of unloading in order to lighten the ship, in case of necessity due to stress of weather, or otherwise for the general benefit of the ship and cargo, also the damage occasioned to the ship or cargo during the unloading and reloading.
- (15) The damage occasioned to the vessel or the cargo, in consequence of the voluntary stranding of the vessel in order to prevent the loss of the vessel by stress of weather, seizure, or other pending danger.
- (16) The expenses incurred in getting off a vessel stranded for reasons specified in the above-mentioned paragraph, and the remuneration due for the operations undertaken and services given in these circumstances.

- (17) The losses and damage incurred by the articles placed in boats in order to lighten the ship in the cases mentioned in the 14th paragraph, including the amount of the contribution due to these boats (*a*); also the damage incurred by goods left on board, if such damage should be considered general average.
- (18) The interest of the bottomry loan contracted for the payment of general average expenses, and the insurance premiums of the said expenses, also the indemnity due to the owner of cargo sold during the voyage at a port which the ship was compelled to enter.
- (19) The expenses of adjusting the general averages.

Damage occasioned to the vessel, or the expenses incurred for it, do not fall under the head of general average, although incurred for the common benefit and preservation, if they result from an inherent defect or the unsoundness of the ship, or if they result from the negligence of the captain or crew.

The sails and rigging and other apparel of the vessel jettisoned, also the anchors, chains, or other articles abandoned, although voluntarily, for the common benefit and preservation, are not brought into the adjustment of the average, if they are not duly entered in the inventory of the ship.

Art. 195. The following are considered general average:—

- (1) The sum paid, or indemnity, for the ransom of a member of the crew sent ashore in the service of the ship and captured or detained as a hostage.
- (2) The expenses of an extraordinary quarantine, not foreseen at the time when the contract of affreightment was made, if this quarantine concerns both the ship and the cargo, including in such expenses the wages and maintenance of the crew during the time of the said quarantine.

Art. 196. If a jettison should become necessary, the least necessary, the most weighty and the least valuable articles are first to be thrown overboard, if this be possible, and afterwards the goods on the upper deck, and eventually those remaining.

Art. 197. Particular averages are the damage and expenses incurred for the ship only or for the cargo only. Such are:—

- (1) Any loss or damage happening to goods by stress of weather, fire, seizure, shipwreck, stranding, leakage, or other casual accident or *force majeure*.

(*a*) *I.e.*, in case of a general average loss sustained by any of these boats, the contribution of the articles placed therein to this loss. Cf. Art. 643 of the Italian Code, *post*, p. 602.

- (2) The loss of sails, cables, anchors, rigging, and cordage, also any other damage caused to the ship.
- (3) Any damage happening to the ship or goods by their inherent defect.
- (4) Expenses resulting from putting into a port, when occasioned by the ship's inherent defect, by the influx of water on account of the unseaworthiness of the ship, by the want of provisions or by any other cause due to the owner of the ship or the captain.
- (5) The wages and maintenance of the crew during ordinary quarantine, or during the repairs made on account of defects or unseaworthiness of the ship, or on account of any other cause due to the owner of the ship or the captain, whether during a detention or stay in a port which concerns the ship only or the cargo only, also the expenses incurred in such a case for the release of the one or the other.
- (6) Expenses incurred for the preservation of the cargo, or for the repair of the casks, cases, or packages containing it, when these expenses do not arise from damage considered general average.
- (7) The excess of freight mentioned in Art. 167 (b).

All damage occasioned to the cargo by accident arising from the negligence of the captain or crew is particular average, when the captain can be sued or an action can be brought against the ship and the freight.

The captain is responsible for all loss occasioned to the shipowner by a prolonged and unauthorized stay in a port.

CONTRIBUTION.

Art. 198. Particular average is borne and paid by the owner of the thing which has sustained the damage or occasioned the expense.

General average is apportioned on the cargo and on one-half of the ship and freight.

The value of the sacrificed things is included in making up the total contributing value.

Art. 199. The provisions of the ship and the clothes and baggage of the crew and passengers do not contribute to the general average, if saved; the value of those thrown overboard or damaged shall be paid for by contribution according to the previous article.

(b) Art. 167 is as follows: "If the captain is obliged to have the vessel repaired during the voyage, on account of accident or *force majeure*, the charterer is bound to wait during the time of the repairs or to pay the whole freight. If the captain, in order to transmit the goods to their destination, charts another ship, the new freight contract is considered to be made for the account of the charterer."

Art. 200. The goods for which there is no bill of lading or declaration of the captain are not to be paid for if thrown overboard; they shall contribute if saved.

Art. 201. The effects laden on the deck of the ship always contribute to general average, if saved.

If they be thrown overboard or damaged by a jettison, the owner has no claim for contribution; his only remedy is to bring an action against the captain.

Art. 202. If the jettison does not save the ship, no contribution is made, and the goods saved are not liable for the payment or indemnity of those which have been thrown overboard or damaged.

If the jettison saves the ship, but if in continuing its voyage the ship is afterwards lost, the goods saved contribute to the jettison on their estimated value in their actual condition, deduction being made of the salvage expenses.

The goods jettisoned do not in any case contribute to the payment of damage sustained after the jettison by the goods saved; and in the case of loss or unseaworthiness of the ship, the goods do not contribute to the payment of the loss or damage which may have happened to the vessel.

Art. 203. If the goods which had been placed in boats in order to lighten the ship, are lost, the apportionment for contribution is made on the whole ship and cargo.

If the ship is lost with the remaining cargo, the goods which had been placed in boats do not contribute if saved.

Art. 204. If, after the adjustment, the jettisoned goods are recovered by the owners, they are bound to return to the captain and the parties interested what they may have received by way of the contribution, deduction being made of the damage caused by the jettison and the expenses of recovery.

Art. 205. The ship contributes on her value at the place of unloading, or on the estimate of her selling price, deduction being made of particular average, including that sustained after the general average.

The freight, which, according to the agreement mentioned in Art. 174, is considered as due, does not contribute (e).

Art. 206. The goods saved and those thrown overboard, or otherwise sacrificed contribute in proportion to their nett value at the place of unloading.

If, as regards the freight, an agreement is made, as mentioned in

(e) Art. 174 provides that "no freight is due for goods lost by shipwreck or stranding, pillage by pirates, or capture by enemies. The captain is bound to refund the freight if paid in advance, unless there be an agreement to the contrary."

the second paragraph of the preceding article. the freight is not deducted from their value.

Art. 207. The description, nature, and quality of the goods which contribute, also of those jettisoned or sacrificed, is determined by the production of the bill of lading and invoices, and in their absence by other evidence.

When the quality or value of the goods shipped, as declared in the bill of lading, is inferior to the real one, these goods contribute upon their real value, if saved, but if jettisoned or damaged, they are only paid for according to the quality and value fixed by the bill of lading.

And *vice versâ* when the quality or value, as declared, is superior to the real one, the goods shipped contribute upon the declared quality or value, if saved, but if thrown overboard or damaged are only paid for according to their real value.

Art. 208. The captain is required, as soon as it is in his power, to draw up a written report stating all the steps taken and operations performed for the common preservation.

The report should state the reasons for the steps taken and synoptically the articles sacrificed or damaged, it should be signed by the principal members of the crew, or the reason of their refusal to sign it should be transcribed in the ship's log-book.

A copy of this report, signed by the captain, must be annexed to the report mentioned in Art. 107 (*d*).

Art. 209. The description, valuation, and apportionment of the losses and damages shall be drawn up at the place of discharge of the vessel, at the instance of the captain, by adjusters appointed in Greece by the President of the Tribunal of First Instance, and where there is none, by the magistrate, abroad by the Greek Consular Authority, and where there is no Greek Consular Authority, by the competent authority of the place.

The statement drawn up by the adjusters is presented in Greece to the Tribunal of First Instance for confirmation; abroad, to the Greek Consular Authority or the competent authority of the place.

Art. 210. In all the cases above mentioned, the captain and the crew have a lien on the goods or their proceeds for the amount of the contribution.

They cannot retain the goods or demand the sequestration of the same, if the receiving party gives security for the payment of the contribution.

(*d*) Art. 107 requires the master, in the event of accident, to furnish a report to the port or consular authorities, giving full particulars of the voyage, the perils encountered, and the casualties that have occurred.

APPENDIX L.

THE LAW OF HOLLAND.

The Law of Holland dates its present form from October 1, 1838. The "Wetboek van Koophandel" was then definitely promulgated in conformity to a royal decree of April in the same year. The code thus issued was the result of the handiwork of many governments, and had been drafted and revised several times. Already in the eighteenth century, in 1768, it had been decreed that the Laws should be codified, but no draft had been absolutely formed at that time. Under Louis Bonaparte further efforts were made, and a draft of a Dutch Commercial Law which, though based on the new French Code, was to be specially adapted to Holland was drawn up. This Code was never completed, owing to the various political changes that came on; but through them all, efforts were being constantly made by the different executives with this end in view, so that, to quote Dr. E. N. Rahusen, of Messrs. Dr. E. N. Rahusen, D. Riechelmann & Dr. I. H. M. van Valkenburg, Average-Adjusters, of Amsterdam, to whom we are indebted for the substance of whatever is written in this Appendix (*a*) concerning the law and practice of Holland, "after the year 1809 drafts were made for a new and independent Code of Commerce in 1815, 1822, 1826, and 1834."

This Dutch Code, while borrowing its form and several detailed provisions from that of France, contains many important additions and modifications, and retains much of old Dutch law. During the time of the union with Belgium, the projected Code was revised so as to bring it into harmony with the laws of Belgium, but at the very moment of the completion and promulgation of this Code that union was dissolved in 1830. The last revisions then had to be revised again, and the Code resumed its more distinctly Dutch character.

It is interesting to remark how much the commercial law of the United States still resembles that of its early founders, dating no doubt from the time when New York was known as New Amsterdam.

(*a*) Dr. Rahusen has kindly revised the Appendix for this edition, and contributed some additional information which has been incorporated therein.

TWEEDE BOEK. ELFDE
TITEL.

VAN AVARIJEN.

Eerste Afdeeling.

Van de Avarijen in het Algemeen.

§ 696. Alle buitengewone onkosten ten diensten van het schip en de goederen gezamenlijk of afzonderlijk gemaakt; alle schade, die aan het schip en de goederen overkomt, gedurende den tijd, bij de derde afdeeling van den negenden titel ten aanzien van het beginnen en eindigen des gevaars bepaald, worden als avarij gerekend.

§ 697. Indien tusschen partijen niet anders is bedongen, worden de avarijen geregeld overeenkomstig de navolgende bepalingen.

§ 698. Er zijn twee sorten van avarijen:

Avarij-grosse of gemeene avarij, en eenvoudige of bijzondere avarij.

De eerste wordt omgeslagen over het schip en de vrachtpenningen, en de lading; de laatste komt ten laste van het schip of van het goed afzonderlijk, hetwelk de schade geleden of de onkosten veroorzaakt heeft.

§ 699. Gemeene avarijen zijn:

1°. Hetgeen aan den vijand of aan zeeroovers voor bevrijding of afkoop van schip en lading gegeven is. In geval van twijfel, wordt het steeds daarvoor ge-

BOOK II. CHAPTER XI.

OF AVERAGES.

First Section.

Of Averages in General.

§ 696. All extraordinary expenses incurred for the good of the ship and the goods together or separate; all damage coming to the ship or goods, during the time fixed in the third section of the ninth chapter for the beginning and ending of the risk, are considered as average.

§ 697. If not otherwise agreed between the parties, averages are adjusted according to the following rules.

§ 698. There are two kinds of averages:

Gross or general average, and simple or particular average.

The first is assessed on the ship, the freight, and the cargo; the last comes to the special charge, either of the ship or that portion of the goods which has suffered the damage or occasioned the expense.

§ 699. To general average belong:

1. Whatever is given to enemies or pirates for the liberation or ransom of the ship and cargo. In case of doubt, it is always to be assumed that the ransom was

houden, dat de afkoop in het belang van schip en lading heeft plaats gehad;

2°. Hetgeen tot gemeen behoud, of ten gemeenen nutte van schip en lading, heeft moeten worden geworpen;

3°. Kabels, masten, zeilen en andere gereedschappen, die men, ten zelfden einde, heeft gekapt of gebroken;

4°. Ankers, touwen en andere voorwerpen, die men almede, ten zelfden einde, is genoodzaakt geweest te laten slippen;

5°. De schade aan de in het schip gebleven goederen, door het over boord werpen veroorzaakt;

6°. De schade, die aan het ligchaam van het schip opzettelijk is toegebracht om het werpen en ligten of bergen der goederen gemakkelijk te maken, of om de waterloozing te bevorderen, en de schade die alsdan door dat water aan de lading is toegebracht;

7°. De oppassing, geneezing, het onderhoud en de schadeloosstelling van alle zich aan boord bevindende personen, die bij het verdedigen van het schip gewond of verminkt zijn geraakt;

8°. De schadeloosstelling of het rantsoen van hen die, in dienst van het schip of de lading naar zee of naar land zijnde afgezonden, genomen, gevangen, gehouden of slaaf gemaakt zijn;

made in the interest of ship and cargo;

2. Whatever, for the common safety or common benefit of ship and cargo, has been thrown overboard;

3. Cables, masts, sails, and other apparel which have for the same purpose been cut or broken;

4. Anchors, hawsers, and other articles which for the same purpose it has been necessary to slip;

5. The damage caused by a jettison to the goods remaining on board;

6. Damage purposely done to the hull of the ship to facilitate the jettison, lightening, or saving of the cargo, or the escape of water, together with any damage that may be done to the cargo by the water in consequence;

7. The cost of nursing, doctoring, maintaining, and indemnifying all persons on board who have been hurt or maimed in the defence of the ship;

8. The indemnification or ransom of those who, having been sent off in the service of the ship and cargo by sea or land, have been captured, imprisoned, detained, or made slaves;

9°. De gagiën en het onderhoud van het scheepsvolk gedurende den tijd, dat het schip is verplicht geweest zich in eene noodhaven op te houden;

9. The wages and maintenance of the crew during the time that the ship has been obliged to lie up in a port of refuge (*b*);

10°. De loodsgelden en verdere havenkosten die bij het in- en uitzeeilen naar en van eene noodhaven moeten betaald worden;

10. The pilotage and other port dues incurred in entering and coming out of a port of refuge;

(*b*) The wages and provisions of the crew, from the time of bearing up for such a port until the ship is ready to resume her voyage, are in practice admitted into general average; and this, whether the first cause of bearing up has been the result of sacrifice or of accident. The Code speaks only of the wages and victuals during the detention in port, but the practice, not illogically, goes further, and commences the allowance from the moment of bearing up. The allowance for provisions is, as in the United States, regulated by a fixed scale.

The cost of fuel and engine stores consumed by a steamer in bearing up for a port of refuge is in practice treated as in general average. The Code is silent on this point, but the practice agrees with the principle of Nos. 9 and 10.

If the cargo has been discharged in the port of refuge, and if the ship, in order that she may be repaired, must take in ballast and sail to some other place, where there is a dry dock, on whom should fall the expenses of ballasting the ship, proceeding to such second port, and returning thence in ballast to the place where the goods have been deposited? The expense, as well of going to the dry dock as of returning, says Dr. Rahusen, should be treated as particular average on ship, being in fact a portion of the cost of repairing her.

Cargo destroyed by fire in a warehouse, after having been discharged for the common safety, is not general average, but loss on cargo; and if the cargo is only damaged by or in consequence of fire, it is particular average on cargo.

The cost of fire insurance, however, is treated as general average. This charge appears in most, if not all, countries, to be treated in the same way as the charge for warehouse rent. It may also be considered as a guarantee for the expenses to be incurred in the port of distress, and as a necessary consequence of the stay in the port.

Temporary repair at a port of refuge is, as a rule, not admitted into general average, even when such repair is of no permanent value to the ship. If, however, by means of such temporary repair, there is a saving of expenditure which would be general average, as, for instance, if by this means a discharge of cargo is avoided, the practice is to admit such temporary repair into general average.

In the event of a jettison, followed by the ship's putting into a port of refuge, the goods jettisoned must contribute towards the general average resulting from such putting in, as if they had remained on board; it being a rule strictly adhered to in Dutch practice, that the goods jettisoned must not be in a better position than the goods which remain on board. For the same reason, if it is clearly proved that the goods jettisoned, had they remained on board, must have suffered damage by a subsequent accident, as, for instance, if the whole cargo has been submerged and recovered, a damaged value only is allowable.

11°. De huren der pakhuizen en bergplaatsen waarin de goederen die in het schip gedurende de reparatie in eene noodhaven niet kunnen blijven, moeten opgeslagen worden;

12°. De reclame-kosten, indien schip en lading zijn aangehouden of opgebragt en beiden door den schipper worden gereclameerd:

13°. De gagiën en het onderhoud van het scheepsvolk, gedurende de voorz. reclame, indien schip en lading worden vrijgegeven;

14°. De kosten van ontlading, de ligterlooën, mitsgaders de kosten om het schip in eene haven of rivier in te brengen, wanneer hetzelfde door storm, vervolging van vijanden of zeeroovers of uit eenige andere oorzaak, tot behoud van schip en lading daartoe genood-

11. The hire of warehouses or depositories for holding the goods which cannot remain on board the ship during the repair in a port of refuge (*c*);

12. The cost of reclamation, in case the ship and cargo are arrested or captured, and both are reclaimed by the captain;

13. The wages and maintenance of the crew during such a reclamation, in case ship and cargo are released;

14. The cost of discharging and the hire of lighters, together with the cost of bringing the ship into a harbour or river, whenever, by reason of storm, pursuit of enemy or pirate, or any other cause, this becomes necessary for the safety of the ship and cargo (*d*); as also

(*c*) Loss of, or damage to, cargo, resulting from a forced discharge, is treated in Holland in a peculiar manner, not very consistent, but perhaps recommended by considerations of practical good sense. If the cargo is discharged to lighten the stranded ship, such loss or damage is always treated as general average. But when the cargo is discharged at a port of refuge, in order to repair the ship, or for its own preservation, then, if the cargo is discharged in boats or lighters, the loss is general average: but it is not so if the cargo is landed directly on the quay. Dr. Rahusen remarks on this: "The true principle seems to be that adopted at the York Congress, viz.: that the damage is general average if the discharge took place in a manner *unusual* at the port of distress, but that it is particular average if the cargo was discharged in the usual way. Of course," he adds, "this is modified if the York-Antwerp Rules, 1900, are to be applied, in which the distinction between *usual* and *unusual* modes of discharging has entirely disappeared."

(*d*) With regard to cargo lost or damaged in discharging it out of the ordinary course of things for the common safety, the practice is as follows: If the cargo is discharged, whether by means of lighters or otherwise, in order to float a stranded ship, then, provided the cost of discharging is general average, all loss or damage to cargo in the process is likewise so treated. If, however, the cargo is discharged at a port of refuge, whether because the ship or cargo or both are in danger, or merely for the purpose of making necessary repair to the ship that she may prosecute her voyage, a distinction is made between discharging by means of lighters and discharging direct to the quay:

zaakt wordt; benevens het verlies of de schade aan goederen overgekomen door derzelver lossing en inlading, uit nood, in lighters of booten, en derzelver wederinlading in het schip;

the loss or damage of the goods occasioned by such forced discharge and loading into lighters and boats, and by reloading them in the ship;

15°. De schade aan het schip of aan de lading of aan beiden veroorzaakt, wanneer het schip om het gevaar der neming of van het vergaan te voorkomen, opzettelijk is op strand gezet, gelijk mede indien zulks in eenig ander dringend gevaar tot behoud van schip en lading heeft plaats gehad;

15. The damage done to the ship and to the cargo when, to prevent the danger of capture or loss, the ship is purposely run ashore; likewise if in any other pressing danger the same measure is taken for the safety of the ship and cargo (e);

in the former case, any loss or damage to the cargo in the process is treated as general average, in the latter it is not. The ground of this distinction is stated to be, that the damage is general average if the discharge took place in a manner unusual at the port of distress, but not so if the cargo was discharged in the usual way. This argument, it is to be observed, leaves out of sight the not unimportant circumstance that the discharging at the port of refuge was in itself an unusual operation. We do not learn, however, that the question has yet come before the Courts. For the effect of the York-Antwerp Rules, 1900, see note (e), *supra*.

In the event of a jettison, followed by a second independent general average, such as the putting into a port of refuge, the goods jettisoned must contribute to this second general average, just as if they had been on board; it being a rule strictly adhered to in Dutch practice, that the goods jettisoned must not in the end be in a better position than if they had remained on board. For the same reason, if it is clearly proved that the goods jettisoned, if they had remained on board, must have suffered damage by a subsequent accident, as, for instance, if the whole cargo has been submerged and recovered, a damaged value only is recoverable. (See note (a), *supra*.)

(e) " Voluntary stranding. The ship *Glenduror* was lying at anchor near the shore, a pilot on board. A storm arose, both cables parted, and they immediately spread sails to try to wear and get clear off from the shore. This endeavour soon proved fruitless; the ship was drifting ashore, and so the crew by the pilot's advice chose a suitable safer spot on the coast in order (as the protest puts it) 'by a voluntary stranding at that place to save the lives of those on board, whilst hoping also to save ship and cargo thereby.' The ship did actually get off later with very little damage, and the cargo was only slightly the worse. This case was submitted to arbitration, and it was decided that in this case a voluntary stranding in the sense of § 699, No. 15, of the Code, had taken place, and hence the damages done to the hull of the *Glenduror* belonged to general average. The view that it was probable and almost certain that the ship in any case would have stranded, does not prevent this stranding being regarded as an intentional one. The stranding which would have happened later at another spot would have been of quite a different character; in fact, in the same storm many other vessels were wrecked. The intentional stranding on a convenient

16^o. De kosten en de hulploonen om het gestrande schip in het voorgaand geval weder vlot te maken, en alle belooning voor buitengewone diensten, ten einde het verlies of de neming van het schip te voorkomen;

17^o. Het verlies of de schade door de goederen geleden die in geval van nood in ligters of booten zijn geladen, daaronder begrepen het aandeel in de avarij-gros door die goederen aan de ligters of booten verschuldigd, en wederkeerig het verlies of de schade aan de in het principale schip geblevene goederen, en aan het schip zelf, na de ligting overgekomen, voor zoo verre die schade of dat verlies in avarij-gros vallen;

16. The expenses and payment for assistance in order that the ship stranded as in the preceding case may be got afloat again, and all payments for extraordinary services, in order to prevent the loss or capture of the ship (*f*);

17. The loss or damage suffered by goods which in case of need are laden in lighters or boats, including therein the share of general average which the goods may owe to such lighters or boats; and reciprocally the loss or damage to the goods remaining in the principal ship, or to the ship herself, occasioned by the lightening, so far as such damage or loss belongs to general average (*g*);

spot was evidently effected with the intention of saving ship and cargo, and this measure all through bore the character of general average, namely, intentionally and with premeditation to sacrifice a part of the whole (in this case, the ship), in order to preserve the rest. (*Magazijn van Handelsregt*, xii., 1870, p. 166.)” More recently, viz., in 1880 and 1887, it was decided by arbitration in two cases of stranding that voluntary stranding had not taken place, if a stranding of the ship was in any event inevitable.

There seems to be no distinction made with regard to cases of voluntary stranding, whether the ship is got off again or becomes a total wreck.

(*f*) If, at the time of taking out the cargo from a stranded ship, there is no reasonable prospect of saving her, then the expense of discharging is in practice not treated as general average, but as a specific charge on the cargo saved, and on the freight, if any, which is saved by the same operation. If, on the other hand, it was at the time expected that the ship would be saved by lightening her, then the whole expense is general average down to the time when the last portion of cargo is removed from the ship. Hence, if a portion of the cargo is first brought into safety, and subsequently the ship, with the remainder of the cargo on board, is towed afloat, the whole expense from first to last is made general average: the portion of cargo already in safety must contribute towards the expense of towing off the partially laden ship. This is so, even though the stranding may take place so near to the port of destination that the cargo is taken thither directly as discharged, and is never reunited to the ship. If, however, the whole of the cargo is first taken out, and carried to its destination, and the empty ship is then towed off, the ship contributes to the cost of discharging the cargo, but the cargo, being in safety, does not contribute to the expense of towing off the ship.

(*g*) This clause is evidently a modification of the well-known rule of Roman law on this head. By that rule, if, for the common safety, goods are transhipped into a

18°. De gagiën en het onderhoud van het scheepsvolk, indien het schip, na het begin der reis, door eene vreemde mogendheid, of door het uitbarsten van eenen oorlog, wordt opgehouden, zoo lang schip en lading niet van alle wederzijdsche verbindtenissen zijn ontslagen;

19°. De bodemerij-premie van geldsommen tot dekking der onkosten, in avarij-gros vallende, opgenomen;

20°. De premie om de kosten, bij het vorige nommer vermeld, te doen verzekeren, of het verlies hetwelk door het verkoopen van een gedeelte der lading in eene noodhaven is geleden, ten einde die avarij-kosten te dekken;

21°. De kosten op het opmaken en bepalen der avarij-grosse vallende;

22°. De kosten, daaronder begrepen de meerdere gagiën en het onderhoud van het scheepsvolk, veroorzaakt door eene buitengewone en bij het sluiten der bevrachting niet voorziene quarantaine, voor zoo verre het schip en de ingeladene voorwerpen daaraan zijn onderworpen;

18. The wages and maintenance of the crew in case the ship, after the commencement of the voyage, is arrested by a foreign Power, or through the breaking out of war, so long as ship and cargo are not released from all reciprocal engagements;

19. The bottomry premium on sums of money raised to cover expenses belonging to general average;

20. The premium of insurance to cover the charges mentioned in the preceding number; and the loss incurred through a sale of a portion of the cargo in a port of refuge, in order to cover average expenses;

21. The expenses connected with the drawing up and adjusting of the general average;

22. The expenses, including the increased wages and cost of maintenance of the crew, occasioned by a quarantine which is extraordinary and not provided for in the contract of affreightment, so far as the ship and goods on board are subject thereto; and

lighter, and the lighter is lost in a storm while the ship is safe, the ship and goods on board shall contribute to the loss of those in the lighter, whereas if the ship is lost in the storm while the lighter is safe, there shall be no contribution; because by the transshipment the goods in the lighter were exposed to a greater risk, whereas the ship and goods left in her were not. To the Dutch legislators it has appeared more equitable that there should be a reciprocity between the two.

23. In het algemeen alle schaden die uit nood, opzettelijk veroorzaakt, en als onmiddellijk gevolg van dien, geleden zijn, en de kosten die, in gelijke omstandigheden, na de vereischte raadpleging, zijn gemaakt tot behoud en gemeen welzijn van schip en lading.

23. In general, all losses which are purposely incurred in case of danger or distress, and their immediate consequences, as also expenses which, in the like circumstances, after due deliberation, are incurred for the preservation and common good of ship and cargo (*h*) (*i*).

(*h*) At this point we may state the practice in Holland in cases not specified in the Code.

(1) Damage by cutting a ship open to extract the cargo is general average. In case the ship is not eventually got off the ground or floated, the amount allowable is, not two-thirds of the cost of repairing, but the diminution of the proceeds of the ship, resulting from such cutting.

When the wreck of spars and sails is cut away, the mast having previously been carried away, the practice under ordinary circumstances is, to allow in general average one half of two-thirds of the cost of new materials, as representing the damaged value.

Damage to sails used to force a stranded ship off the ground is general average. So likewise is damage to a steamer's machinery worked for the same purpose.

With regard to coals consumed during such working of the engines, the practice is to treat this item as general average.

Damage done to a ship in resisting the attack of an enemy or pirate is considered as general average. With regard to the ammunition expended, the better opinion seems to be, that this is not general average, since that is the very purpose for which the ammunition is put on board. There is, however, no express legislation or practice on either of these points; and cases of this kind are, of course, at the present time of rare occurrence.

Damage done to a ship in order to extinguish a fire is general average.

Cargo damaged by water poured or let into the ship to extinguish a fire is general average.

Hawsers and other ship's materials carried on deck contrary to good seamanship, and thrown overboard, are not general average.

Press of Sail.—Damage done by carrying a press of canvas to beat off a lee shore or escape an enemy is not regarded as general average.

Jettison on account of ignition is general average if the fire was caused in consequence of a leak sprung during a gale. But if the condition of the cargo when shipped caused the subsequent ignition, it is *vice propre* of the cargo, and no claim for contribution can be made. But Dr. Rahusen is of opinion that the shipowner can claim freight for the cargo jettisoned from the shipper, and he is no doubt entitled to damages caused by the fault of the shipper.

(2) Damage by docking a ship in a gale is not considered general average in Holland. Dr. Rahusen is of opinion that there is really no difference in principle between such damage, and the damage a ship may sustain from grounding at the entrance of a port of refuge.

(i) "*Protest.*"—The costs of a protest in order to prove general-average damages belong to general average. (Mag. v. H., xvi. p. 245.)"—(Ul., p. 94.)

"*Costs of Creening.*"—A ship had got aground by accident, and, in order to get her off, had to be lightened of her cargo. From this a general average case sprung, so that

§ 700. Wanneer inwendige ge- breken van het schip, deszelfs on- deugdzzaamheid tot het doen der	§ 700. When the inherent defect of the ship, her unfitness to per- form the voyage (<i>k</i>), or the fault
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to estimate the contributory value of the ship, she had to be careened. But also, as she had sustained damages to the hull by the stranding, those had to be surveyed and considered whether the bottom needed repair. Consequently the costs of this careening are only to be taken at half their amount in general average, and not at the whole cost, as the adjuster regarded it. (Mag. v. H., vii. p. 281.)"—(Ul., p. 94.)

(*k*) “(a) Unseaworthiness. The ship *Quintet* was chartered for a voyage from Java, or Sumatra, to Amsterdam, just after it had been repaired in Soerabaija under the superintendence of experts. The loading of the vessel with produce took place in Soerabaija and Passaroean, but after leaving this last port the voyage could only be carried on as far as Batavia, since—so the shipowners maintained—between Passaroean and Batavia the ship encountered a violent storm, in consequence of which she sustained serious damages, and the cargo also became partially injured. In Batavia the damaged part of the cargo had to be sold, and the *Quintet* herself was condemned as not worth repairing. The rest of the cargo was delivered at Amsterdam by another vessel. The shipowner declared himself ready to pay the proceeds of the cargo sold in Batavia, after deducting the contribution lying on it for general average, &c. The shipper demanded, however, compensation for the full value of the goods sold, and refused to contribute at all to general average, because the damages and costs had arisen from the ship's unseaworthiness, the captain not having succeeded in proving that *force majeure* had prevented his delivering the entire cargo. The shipper gained his cause on the following grounds: It was acknowledged by both parties that the crew, after they had taken in the full cargo at Passaroean, refused to continue the voyage because the *Quintet* leaked. In consequence of this, experts were nominated, who certified that the ship actually did leak. If the vessel had not had her hull repaired so recently, they would have advised the discharge of the cargo either wholly or in part, in order to discover the leak; under existing circumstances the experts did not consider this absolutely indispensable, and saw no risk in the *Quintet* going on to Batavia, where she was to complete her crew, and where a more certain opinion about the state of her hull could be obtained. From this decision of the experts it follows that there was no recognition of the seaworthy condition of the ship for a voyage from Java to Holland, and the defendant could not fall back upon the experts having ascribed the *Quintet's* leaking to her having lain so long dry during the repairs at Soerabaija, since in their report after they had not said anything of finding a leak. The certificate of seaworthiness immediately given after the above repairs, although drawn up in good faith, lost its force, since the same experts five weeks later, after the ship was loaded, had formed quite a different opinion. That this second was the right view was proved by the report at Batavia. This stated that the longitudinal frame of the ship was loose, that several waterways below and above deck were broken, and that the whole vessel more than before had strained in her form. One can only speak of a further straining when some certain alteration of the form of the vessel has already taken place. From all these circumstances the unseaworthiness of the *Quintet* is clearly deduced, and the owner is bound to compensate the full value of that part of the cargo that was not delivered, and to bear alone the whole expenses. (Mag. v. H., xi. p. 100.)

“(b) Unseaworthiness. Breaking down of engine. The British steamer *Russell* was six days out on a voyage from Galatz to Rotterdam, when suddenly from some unexplained cause the cylinder cover burst, and the engine could work no more. The

reize, of schuld en nalatigheid van | or neglect of the captain (*l*) or
den schipper of het scheepsvolk, de | crew, has occasioned the damage

steamer had to be towed into Malta and have the damages repaired there. The costs thus incurred were brought into general average, but the cargo owners refused to contribute because the incapable condition of the engine had occasioned the expenses. The Court decided, however, in favour of the shipowner, because according to § 700 it is the business of the cargo owners in such a case to bring proof of unseaworthiness. The Court did not accept the proof from the position of eye-witnesses, because it did not exclude the possibility that the bursting of the cover might have resulted from causes which could be esteemed *force majeure*. (Mag. v. H., xvii. p. 141.)

“(c) Insufficient outfit. Extra consumption of coal. The ship *Eliza Hunting*, from Soerabaija to Amsterdam, took in at Point de Galle a fresh supply of coal for the voyage thence to Aden. On the way she encountered high contrary winds, so that her supply of fuel was exhausted when still 353 miles off Aden. She made signals of distress, and she received from the British steamer *Hongkong* 18 tons of coal, by using which she reached Aden. The price of this coal did not belong to general average, because the captain ought to have been prepared for contrary winds, and to have supplied himself at Point de Galle with a sufficient supply of coal. (Mag. v. H., xvi. p. 247.)”—(Ul., p. 94.)

(*l*) Fault of the captain. The ship *Elise* had taken in at Archangel a cargo of linseed for Zwolle, in Holland. Shortly after leaving Archangel she had a collision, and was damaged. After needful repairs at Archangel she resumed her voyage, had to encounter violent storms on the way, and arrived at last at Nieuwe Diep. As long ago as before the second time of leaving Archangel the captain had asked the consignees whether they would not agree to his delivering the cargo at Nieuwe Diep, since lighters could be sent there to receive the cargo and take it on board them up to Zwolle. Afterwards, on reaching Nieuwe Diep, the captain wrote again to the same effect to the freighters, because he thought his ship was too crank, and could not lie in Zwolle safely without cargo. The day after this second request was made, the captain telegraphed and wrote again to the consignee, now declaring that the ship was leaky, the cargo heated, and consequently immediate lighterage was necessary. In fact, in the course of several days it was certified by experts that the cargo was badly heated, and the ship rather leaky. The consignees of the linseed protested on the other hand, and, after long negotiations, at last it was agreed that the repaired ship should take in again the sound part of the cargo, and deliver it at Amsterdam, all rights reserved. This was done; but the cargo-owners refused to pay any costs at all of the *Elise* during her delay at Nieuwe Diep, and the Judge decided in their favour on the following grounds: “The captain was bound by Dutch law to fulfil his voyage as quickly as possible; in putting into a port of refuge he had to take counsel with shipowner, shippers as far as they are present, and with the officers of the crew. The captain had not any right to run into Nieuwe Diep as a port of orders, for the destination of the cargo to Zwolle had not been altered. The necessity of running into Nieuwe Diep had not been sufficiently proved. A ship's council had not been held, an obligation to run in on account of sea-disaster had not been deposed, and it did not appear that the repairs, which principally concerned the former collision-damages, might not have been put off a short time longer. Zwolle could have been reached in a day from Nieuwe Diep, and, instead of this, the captain lost a whole week in correspondence. In his first letter from Nieuwe Diep to the consignee the captain did not rest on the necessity of the repairs of his ship at all as a reason for having to discharge, but on the crankness of the vessel. (Mag. v. H., ii. p. 211.)”—(Ul. p. 97.)

schade of onkosten hebben veroorzaakt, zijn laatstgemelden, hoezeer ten nutte van schip en lading vrijwillig en na vereischte raadpleging gemaakt, geene gemene avarië.

§ 701. Bijzondere avariën zijn:

1°. Alle schaden en verliezen aan het schip of aan de lading overgekomen door storm, neming, schipbreuk of toevallige stranding;

2°. Bergloonen en de kosten bij berging uitgegeven;

3°. Het verlies van, en de schade geleden aan kabels, ankers, touwen, zeilen, boegspriet, stengen, ra's, booten en scheepsgereedschappen, veroorzaakt door storm of ander onheil op zee;

4°. Reclame-kosten en het onderhoud en de gagiën van het scheepsvolk gedurende de re-

or expense, such damage or expense, although incurred purposely, after due deliberation, and for the common benefit of ship and cargo, is not general average (*m*).

§ 701. Particular averages are:

1. All damage and loss occurred to the ship or cargo by storm, capture, shipwreck, or casual stranding;

2. Salvage and the disbursements made at the saving;

3. The loss of, and the damage caused to cables, anchors, cordage, sails, bowsprit, topmasts, yards, boats, and tackle, by storm or other mischief at sea;

4. The charges of reclaiming, and the maintenance and wages of the crew during the reclaiming,

(*m*) Dr. Rahusen is of opinion that the Code here only refers to claims on the part of the shipowner; and leaves it an open question whether a merchant whose goods have been jettisoned from an unseaworthy ship may not claim contribution, in the first instance, from the other owners of cargo; each having a right of eventual recourse against the shipowner. (Compare § 733 of the Code.)

In no country is the doctrine of seaworthiness so strongly maintained against ship-owners and captains as in Holland. The captain has to prove by sea-protest and log-book such perils as may be deemed sufficient to have caused the damage. If not successful in this proof, there is a presumption against him, and he is entitled neither to claim in general average nor to recover from the underwriters. No great weight is attached to the certificates of surveyors before the voyage, and they do not exonerate the captain from showing sea-peril as the cause of the disaster. Art. 479 of the Code runs thus:

“The charterer owes no freight, and has a right to damages, if it is proved that the ship at the commencement of the voyage was not in a fit state to perform it. Such proof is allowed notwithstanding and against the certificates of survey before sailing.”

This is extended in practice to cover matters of general average and insurance. The *onus probandi* falls on the captain, and the practical result is that, as a general rule, Dutch ships are always kept in a perfectly seaworthy condition.

Hence jettison caused by unseaworthiness gives no claim in general average.

clame, indien slechts het schip of de lading zijn aangehouden;

5°. Die bijzondere reparaties der fustage en de kosten van beredding der beschadigde koopmanschappen, voor zoo verre dit een en ander niet het onmiddellijk gevolg is van eene ramp die tot avarië-gros aanleiding geeft;

6°. De meerdere vracht en de onkosten van laden en lossen welke, bij afkeuring van een schip gedurende de reis, moeten betaald worden, in de gevallen waarin, volgens de bepalingen van art. 478 van het Wetboek, de goederen door een ander schip voor rekening van de inladers worden vervoerd; en

7°. In het algemeen, alle schade, verliezen en de gemaakte onkosten die niet zijn veroorzaakt of gemaakt opzettelijk en tot behoud en gemeen welzijn van schip en lading, maar die zijn geleden door of gemaakt ten behoeve van het schip alleen, of voor de lading alleen, en welke dien volgens, naar aanleiding van art. 699, niet onder avarië-gros behooren.

§ 702. Wanneer een schip uit hoofde van steeds bestaande droogten, ondiepten of banken, met zijne volle lading, noch van de plaats waar het vertrekken moet, noch naar de plaats van deszelfs bestemming kan gevoerd worden, en

if only the ship, or the cargo alone, have been seized;

5. The special repairs of casks and the expenses of bringing in order the damaged merchandise, for as much as they are not the direct consequence of any casualty which constitutes general average;

6. The surplus freight and the charges of loading and unloading, which must be paid if the ship is condemned during the voyage, in the cases in which the goods are forwarded by another vessel, for account of the shippers, according to the stipulations of the 478th art. of this Code; and

7. Generally, all damage, loss, and expenses made which are not caused or incurred purposely and for the preservation and common good of ship and cargo, but which have been sustained or incurred on behalf of the ship alone, or for the cargo alone, and which consequently, according to § 699, do not belong to general average (*n*).

§ 702. When a ship is prevented by existing shoals, shallows, or banks, from leaving the place of departure or reaching her place of destination with her full cargo, and a part thereof must thus be conveyed to the ship by, or discharged

n) Cost of repairs to cargo at a port of refuge, when damaged by accident, is particular average.

alzoó een gedeelte der lading met lighters aangevoerd of in lighters moet gelost worden, worden zoo-danige ligter-loonen niet als avarij beschouwd.

De kosten komen ten laste van het schip, ten zij bij cognoscementen of de chertepartij een ander beding zij gemaakt.

§ 703. De bepalingen van de arts. 698, 699, 700, en 701, ten aanzien van de gemeene en bijzondere avariën, zijn insgelijks toepasselijk op de zoo evengemelde lighterschepen en op de voorwerpen in dezelve geladen.

§ 704. Indien gedurende de vaart, het zij aan de lighterschepen, het zij aan de goederen in dezelve geladen, eene schade overkomt, welke tot gemeene avarij behoort, wordt deze voor een derde door de lighterschepen, en voor twee derden door de aan boord van dezelve zich bevindende goederen, gedragen.

Deze twee derden worden vervolgens bij wijze van avarij-gros

in lighters, such lighterage is not considered as average (o).

The expenses are to be borne by the ship, if no other agreement has been made by the bills of lading or charterparty (p).

§ 703. The rules respecting general and particular average contained in §§ 698, 699, 700, and 701 likewise apply to the lighters just mentioned and the objects loaded in the same.

§ 704. If, during their navigation, any damage comes to the lighters or to the goods loaded therein which belongs to general average, one-third thereof is supported by the lighters, and two-thirds by the goods which are on board of them at the time.

These two-thirds are afterwards assessed as general average, on the

(o) "*Lighterage in the ordinary course of the voyage.*—A captain cannot justify his putting into another port (Nieuwe Diep) near the port of destination (Zwolle) and discharging cargo there, by saying that he could not reach that port of destination on account of the great draught of his vessel. His delay at Nieuwe Diep, and the discharge of the cargo itself was not warrantable; it only followed from the ship's draught that the captain was authorized to transfer the cargo into lighters at Nieuwe Diep, and at his own charges to get it forwarded to Zwolle. (Mag. v. H., ii. p. 218.)" —(Ul. p. 100.) See *supra*, p. 576, note (l).

(p) "*Lighterage in the ordinary course of the voyage.*—The words appended in English charter-parties as to the delivery at the port of destination 'or so near thereunto as she may safely get,' do not free the ship from bearing the lighterage costs which are necessary to bring the vessel down to such a draught as to enable her to get up to the port of destination. (Mag. v. H., iv. 1862, p. 123; *ibid.* xvii. 1875, p. 123.) On the other hand, it has also been decided that when the charter-party contains this clause, the captain is not liable for the cost of lighterage, which must be borne by the consignees. (Mag. v. H., vi. p. 239; *ibid.* x. p. 271.)"

omgeslagen over het principale schip, de vrachtpenningen en de geheele lading; die der lighterscheepen daaronder begrepen.

§ 705. Wederkeerig blijven de goederen, in de lighterscheepen geladen, in gemeenschap met het principale schip en de overige lading, en dragen in de gemeene avariën, welke aan het schip en de lading mogten zijn overgekomen, tot op het oogenblik dat de eerst-gemelde ter plaatse hunner bestemming zullen zijn gelost, en aan de geconsigneerden overgeleverd.

§ 706. Goederen die nog niet zijn ingeladen, het zij in het principale schip, het zij in de vaartuigen bestemd om dezelve naar het schip over te voeren, dragen in geen geval, in de rampen die aan het principale schip waarin dezelve geladen moeten worden, overkomen.

§ 707. De schade, aan de koopmanschappen overgekomen uit hoofde dat de schipper verzuimd heeft de luiken digt te sluiten, het schip behoorlijk vast te maken, bekwame werktuigen tot het hij-schen te bezorgen, en door alle andere ongevallen, uit opzet of achteloosheid van den schipper of het scheepsvolk voorkomende, zijn bijzondere avariën, waarvoor de in-lader zijn verhaal heeft op den schipper, het schip en de vracht.

§ 708. De loods-, sleep- en andere gelden om de havens of rivieren in of uit te loopen, alle tollèn

principal ship, the freight, and the whole cargo, including that of the lighters.

§ 705. Reciprocally the goods laden in the lighters continue in common with the principal ship and the remainder of the cargo, and participate in the general averages which may have come to the ship and cargo, till the moment the first-named shall have been landed at their place of destination and delivered to the consignees.

§ 706. Goods not yet laden either in the principal ship or in the vessels destined to convey them to her, do not in any case participate in the casualties befalling the principal ship in which they are to be laden.

§ 707. Damage come to the merchandise in consequence of the master having neglected to close the hatches, to make the ship properly fast, or to provide proper means of hoisting, and of all other misfortunes caused by design or carelessness of the master or crew, is particular average, for which the shipper has his recourse against the master, the ship, and the freight.

§ 708. The pilotage, towage, and other dues to enter or leave harbours or rivers, all tolls and ex-

en uitgaven bij het afvaren en voorbij zeilen, alle tonne-, anker-, vuur-en baak-gelden, en alle andere regten, die tot de scheepvaart betrekkelijk zijn, zijn geene avarijen, maar gewone kosten voor rekening van het schip; ten zij bij het cognoscement of de chertepartij anders bedongen zij.

Diese kosten komen nimmer ten laste van de verzekeraars, ten zij in het bijzonder geval, dat dezelve zijn het gevolg van eenige onvoorzienene en buitengewone omstandigheden gedurende de reis opgekomen.

§ 713. Ingeval van schade aan een verzekerd schip, door zeeramp geleden, draagt de verzekeraar slechts twee-derden der kosten, tot de reparatie vereischt, om het even of dezelve al of niet hebbe plaats gehad, en zulks in evenredigheid van het verzekerde to het onverzekerde gedeelte. Een derde blijft voor rekening van den verzekerde wegens vooronderstelde verbetering van oud tot nieuw.

§ 714. Indien de reparatie heeft plaats gehad, wordt het bedrag der kosten bewezen door rekeningen en alle andere middelen van bewijs, en, des noods, door begrooting van deskundigen.

penses at the departure or passage, all tonnage, anchorage, beaconage, or light dues, and all other duties relative to navigation, are not average but usual expenses for account of the ship, unless it be otherwise agreed upon by the bill of lading or the charterparty.

These expenses never come to the charge of the underwriters, unless in the particular case of their being the consequence of some unforeseen and extraordinary circumstances occurring during the voyage.

§ 713. In case of damage to an insured ship, sustained by perils of the sea, the underwriter only bears two-thirds of the costs of the repairs, whether they have actually taken place or not, and this in proportion of the insured to the uninsured part. One-third remains for account of the insured to set off the supposed amelioration by new for old (q).

§ 714. If the repairs have taken place, the amount of the costs thereof is proved by accounts, and any other evidence, and, if need be, by an estimate by experts.

(q) "*Deduction of a third for ship's gear sacrificed.*—The rule of §§ 713, 716, about the deduction for difference between new and old, applies also to general average. The law lays the *onus probandi* that the article was new, and consequently not liable to deduction, on the captain on account of the shipowner. The rule of § 716, that no deduction takes place if the ship is new and on her first voyage, does not apply with regard to its gear, but the captain must give proof that the sacrificed article (in the case of some hawsers disputed) is new. (Mag. v. H., xvi. p. 246.)"—(Ul. p. 103.)

In geval de reparatie niet gedaan is, wordt het bedrag derzelve door deskundigen begroot.

If the repairs have not been done, the amount thereof is estimated by experts.

§ 715. Indien het, des noods na verhoor van deskundigen, blijkt, dat door de gedane reparatie, de waarde van het schip meer dan een derde is vermeerderd, betaalt de verzekeraar, in evenredigheid als bij § 713 is vermeld, het volle beloop der gemaakte kosten, onder aftrek der door verbetering vermeerderde waarde.

§ 715. When it appears, if need be from the experts' report, that the value of the ship has increased by more than one-third, owing to the repairs, the underwriter pays, in the proportion mentioned in § 713, the full amount of the expense incurred, after deducting the increase of value.

§ 716. Indien daarentegen de verzekerde, des noods na begrooting als voren, bewijst, dat de reparatie geene verbetering of vermeerdering der waarde van het schip, hoegenaamd, heeft te weeg gebracht, en wel bepaaldelijk doordien het schip nieuw en op deszelfs eerste reize de schade heeft geleden, of doordien de schade is aangekomen aan nieuwe zeilen of nieuw scheepsgereedschap, of wel aan ankers, ijzeren ketting-kabels of aan eene nieuwe koperen huid, heeft de aftrek van een derde geen plaats, en is de verzekeraar verplicht het geheel beloop der reparatie-kosten, in evenredigheid als bij § 713 is vermeld, te vergoeden.

§ 716. On the other hand, if the assured proves, if need be by the report as aforesaid, that the value of the ship has not been augmented in any way by the repairs, especially from her being new, and having suffered the damage on her first voyage, or by the damage having occurred to new sails or new tackle, or to anchors, chain-cables, or new copper sheathing, then the deduction of one-third does not take place, and the underwriter is bound to make good the whole costs of the repairs, in the proportion mentioned in § 713 (*r*).

(*r*) This article applies in terms only to particular average, but in practice no distinction is drawn between particular and general average in this respect.

Tweede Afdeling.

*Van het omslaan en dragen der
avarij-grosse of gemeene avarij.*

§ 722. De berekening en verdeeling van avarij-grosse geschiedt ter plaatse, waar de reis eindigt, ten zij partijen deswege andere bedingen hebben gemaakt.

§ 723. Bij het staken eener reis binnen dit land, of bij stranding der schepen aldaar, worden de rekening en verdeeling opgemaakt ter plaatse, van waar de schepen binnen dit land zijn vertrokken of hadden moeten vertrekken.

§ 724. De berekening en verdeeling der avarij-grosse worden gedaan ten verzoeken van den schipper en door deskundigen.

De deskundigen worden benoemd door de partijen of door de regtbank van arrondissement der plaats, waar de berekening en verdeeling binnen het koninkrijk geschieden moeten.

De deskundigen moeten worden beëdigd, voor dat zij hunne werkzaamheden beginnen.

De verdeeling moet worden gehomologeerd door de regtbank van het arrondissement.

Second Section.

Of the Assessment and Apportionment of General Average.

§ 722. The adjustment and apportionment of the general average should be made at the place where the voyage ends, unless the parties thereto have stipulated otherwise.

§ 723. In case of the interruption of the voyage within this country, or of the stranding of the ship there, the adjustment and apportionment is to be made up at the place, in this country, from which the ship set sail or was to have set sail.

§ 724. The estimate and apportionment of general average are made at the request of the master, and by experts.

The experts are appointed by the parties or by the district court(s) of the place where the estimate and apportionment must be made in this country.

The experts must be sworn previous to beginning their work.

The apportionment must be sanctioned by the district court (t).

(s) "*Non-renunciation of authorized experts.*—If the captain and the consignees in India have agreed 'to bring to Amsterdam the case in dispute, as to the existence or non-existence of a general average in case the average statement is made,' this is nothing more than a deviation from the rule that the assessment and distribution are to be made where the voyage ends, but not an agreement to leave the assessment and distribution to adjusters at the captain's option. (Mag. v. H., xv. p. 141.)"—(Ul. p. 107.)

(t) "The custom," says Dr. Rahusen, "is that the adjuster is appointed by the

Buiten's lands wordt de avari-j-gros door de aldaar daartoe be-voegte magt opgemaakt.

§ 725. Bij eene geheele staking der reis onder weg, of verkooping van de lading in eene noodhaven, beide buiten dit land voorvallende, worden de vordering, berekening en verdeling der schade gedaan ter plaatse, alwaar zoodanige staking of verkoop voorvalt.

§ 727. De gemeene avari-jen worden gedragen:

Door de waarde van het schip in den staat waarin hetzelfde aangekomen is, met bijvoeging van hetgeen bij vergoeding van gemeene avari-j wordt verstrekt;

Door de vracht, onder aftrek

In foreign parts, the general average is adjusted by the authority competent there.

§ 725. In case of the entire breaking up of the voyage on the way, or of a sale of the cargo in a port of refuge, taking place out of this country, the claim, adjustment, and apportionment of the loss is to be made at the place where such breaking up or sale occurs (*u*).

§ 727. General average is to be borne:

By the value of the ship in the condition in which she arrives, with addition of whatever is compensated in general average (*x*);

By the freight (*y*), after deduc-

interested parties, and that the adjustment, if disputed, is submitted in Amsterdam to the decision of a permanent committee of three legal men of standing, who give their opinion without appeal. In Rotterdam the dispute is submitted to the ordinary jurisdiction of the Courts."

(*u*) When a ship is wrecked or condemned at a port of refuge, and the goods are sent on to their destination, the proper place for adjusting the general average is the port of destination of the goods, in case they are brought thither for risk and account of the shipowner. If, however, no ship can be chartered at the port of refuge or in a neighbouring port, then the voyage ends at that port, and the adjustment must be made there, although the cargo may be subsequently carried by the owner of it to its original destination.

(*x*) As to the contributory value of the ship, the law of Holland seems to be the same as that which has been stated to be the law of England. Custom, however, is in so far at variance with the law that, if the ship has been valued in her damaged state at the port of refuge, that value is adopted as her contributory value, adding the amount to be made good, and deducting posterior damages. This custom seems to be based principally upon convenience, as a second valuation is thereby avoided.

(*y*) When freight is absolutely prepaid, its share of general average is payable, as in England, by the charterer.

Advances on freight made by the charterer or shipper, and insured by them for captain's account, contribute upon the same principle, and the share of general average is paid by the underwriter of the advance. If the captain is charged with the premium, but the insurance is really not effected by the charterer or the shipper, these must pay the share of general average themselves.

van de gagiën en het onderhoud van het scheepsvolk, en

Door de waarde van de goederen, welke zich ten tijde van het voorvallen der schade aan boord, of in de lighters of booten hebben bevonden, of welke vóór de ramp uit nood zijn geworpen en vergoed geworden; of wel tot dekking van avarijs-kosten hebben moeten worden verkoopt.

Gemunt geld draagt in de gemeene avarijs naar den koers der plaats waar de reis eindigt.

§ 728. De ingeladene goederen worden begroot naar derzelver waarde op de plaats der lossing, onder korting van de vracht, inkomende regten en kosten der ontlading, mitsgaders der bijzondere avarijs, gedurende de reis ten laste derzelve gevallen.

Dit lijdt uitzondering in de volgende gevallen:

Wanneer de berekening en de verdeeling opgemaakt moeten worden ter plaatse waar de schepen binnen dit land zijn vertrokken, of hadden moeten vertrekken, wordt de prijs der ingeladene goederen bepaald naar de waarde die dezelve ten tijde der inlading hebben gehad, met de onkosten, tot aan

tion of the wages and provisions of the crew (z); and

By the value of the cargo which at the time of the occurrence of the loss was on board, or in the lighters or boats, or which before the disaster had in case of peril been thrown overboard and have been made good; or which may have been sold to cover average expenses.

Specie contributes to the general average at the rate of exchange at the place where the voyage ends.

§ 728. The goods on board are to be valued according to their price at the place of discharge, deducting the freight, import dues, and expenses of unloading, together with any particular average come to their charge during the voyage.

This is subject to the following exceptions:

When the adjustment and apportionment are to be made up at the place within this country from which the ship sets sail, or was to have set sail, the value of the goods on board is to be taken at their worth at the time of shipment, with the expenses till on board, not including the premium

(z) The deducting of provisions is plainly wrong on principle, but it is the rule. It is to be remarked that, as the Dutch law with regard to the payment of the crew's wages is the same as our own common law previously to the passing of the Merchant Shipping Act, that is to say, as the crew forfeit their wages if the ship be totally wrecked, it is right in principle, as it is in practice, to deduct from the contributory value of the freight the entire amount of wages, not merely reckoning from the time of the general average act, but from the commencement of the voyage, or from the last preceding earning of freight; and the same rule ought to be followed in English adjustments of general average on Dutch ships.

boord, de premie van assurance daar niet bijgerekend; en in geval de goederen beschadigd zijn, naar derzelver wezenlijke waarde.

Wanneer, buiten's lands, de reis geheel wordt gestaakt, of de goederen worden verkocht, en de avarij te dier plaatse niet heeft kunnen worden opgemaakt, alsdan wordt de prijs, dien de goederen onder weg waardig zijn, of ter plaatse der verkooping zuiver hebben opgebragt, als het dragend kapitaal berekend.

§ 729. De over boord geworpene goederen worden gewaardeerd volgens den marktprijs van de plaats der ontlading van het schip, na aftrek der vracht, inkomende regten en ordinaire onkosten; derzelver aard en gesteldheid worden opgemaakt uit cognoscementen, facturen, en andere bewijzen.

of insurance; and, in case the goods are damaged, their actual value.

When, abroad from this country, the voyage is wholly broken up, or the goods have been sold, and the average cannot be made up at that place, then the sum which the goods would be worth under way, or that which they have fetched at the sale, must be taken as their contributing capital (*a*).

§ 729. The goods thrown overboard must be valued according to the market price at the ship's port of discharge, deducting the freight (*b*), import duties, and ordinary expenses; their quality and condition is to be determined by bills of lading, invoices, and other proofs (*c*).

(*a*) When the voyage is broken up at some intermediate place, the values at the place where it is broken up form the basis of the adjustment. If, however, the captain, as is his duty, hires another ship, and sends the cargo to its destination, that is not a breaking up of the voyage, and the basis of adjustment must in that case be the value of the cargo at the port of destination.

(*b*) "The legal rule that from the market price of the jettisoned goods the full amount of freight must *always* be deducted, and only the balance be compensated to the owner of the goods sacrificed, I regard, looking at § 481 of the Dutch Code, as mistaken. According to § 481 (here incidentally deviating from the German Code), freight of goods jettisoned for the common safety is to be paid in full to the shipowner, and by the shipper, for that whole section of the Dutch Code is treating only 'of the rights and duties of the shipowner and the shipper.' By the sacrifice of the goods, their market price at the place of destination, including freight, is lost by the cargo-owners, and so the sum total of these ought not to be diminished. A deduction of freight is only justifiable then, when as for example the case is in the German Code, no freight is to be paid on goods sacrificed, so that the shipper is spared freight by reason of the sacrifice."—(U. p. 109.)

(*c*) When the goods jettisoned either were damaged at the time, or must have become damaged had they remained on shipboard, the damaged value only is allowed, as in England. The principle is, that he whose goods are jettisoned never may be a gainer, but must be brought into the same position as if his goods had remained on board.

§ 730. Indien de aard of hoedanigheid der koopmanschappen bij het cognoscement verkeerdelijk is opgegeven, en deze eene grootere waarde hebben, wordt de schade over dezelve omgeslagen op den voet van de wezenlijke waarde, indien zij behouden zijn gebleven.

Doch zoo zij door werping verloren zijn geraakt, wordt de schade vergoed volgens de hoedanigheid bij het cognoscement opgegeven.

Indien de opgegevene koopmanschappen van eene mindere hoedanigheid zijn dan bij het cognoscement is aangewezen, dragen zij in de schade volgens de hoedanigheid bij het cognoscement opgegeven, indien zij behouden zijn gebleven.

Zij worden betaald op den voet van hare wezenlijke waarde, indien zij over boord geworpen zijn.

§ 731. De mondbehoeften, de kleederen van het scheepsvolk en de dagelijkse kleederen der passagiers, gelijk mede de voor de verdediging van het schip vereischte ammunitie, dragen niet in de schaden van het werpen der goederen. De waarde van al hetgene van dien aard over boord geworpen is, wordt vergoed bij omslag over alle andere goederen.

§ 732. De goederen, waarvan geen cognoscement van den schipper voorhanden is, of die niet op het manifest der lading staan,

§ 730. If the kind or quality of the merchandise has been inaccurately described in the bill of lading, and they are more valuable, the loss is assessed thereon at the rate of the real value, if the goods have been saved.

If, however, they have perished by jettison, the loss is made good according to the quality mentioned in the bill of lading.

If the goods mentioned are of a lower quality than is stated in the bill of lading, they contribute to the loss according to the quality mentioned in the bill of lading, if they have been saved.

They are made good at the rate of their real value, if they have been jettisoned.

§ 731. Provisions, wearing apparel of the crew, and ordinary wearing apparel of the passengers, likewise ammunition provided for the defence of the ship, do not contribute towards the loss by jettison (*d*). The value of all such articles, if themselves jettisoned, is to be made good by assessment over all the goods.

§ 732. The goods of which no bill of lading of the captain exists, or which are not mentioned in the manifest, are not compensated if

(*d*) "Although jettison only is spoken of in § 731, the rule holds good in all other cases of general average sacrifices."—(Ul. p. 111.)

worden niet betaald, indien zij over boord geworpen zijn; zij dragen in de schade, zoo zij zijn behouden gebleven.

they have been thrown overboard; they participate in the loss if they are saved.

§ 733. De goederen, op den overloop van het schip geladen, dragen mede in de schade, indien zij behouden zijn gebleven.

§ 733. Goods laden on the deck of the ship contribute to the average, if they remain in safety.

Indien de schipper de goederen, buiten kennis of toestemming van den inlader, op den overloop heeft geplaatst en dezelve zijn geworpen of door de werping beschadigd, is de inlader tot den eisch van den omslag gerechtigd, behoudens het verhaal van alle belanghebbenden op het schip en den schipper.

In case the captain without the knowledge or concurrence of the shipper, has placed them on deck, and these goods have been thrown overboard or damaged through the jettison (e), the shipper is entitled to recover his loss in the general average; without prejudice to the rights of all parties concerned against the ship and master (f).

(e) "*Jettison of unauthorized deck cargo.*—If the captain has stowed goods on deck without the shipper's permission, and has to throw them overboard to save ship and cargo from a common danger, the fact that the shipper is to be compensated in general average for the damage his goods have thereby suffered does not annul the liability of the captain to be sued on account of the deck cargo. The rule in § 733 is rather to be regarded as a special provision deviating from general sea law to protect the shippers concerned, which by no means only reserves the right of the other cargo owners to have recourse against the captain, but also justifies the owner of the deck cargo himself to take measures. Under such circumstances the captain is not allowed to argue that he was compelled to the jettison by *vis major*. (Mag. v. H., xiv. p. 157.)" —(Ul. p. 112.)

(f) This clearly implies that the shipment on deck is regarded as improper. Presumably, if goods are so carried with the consent of the shipper, and are jettisoned, the loss would not be treated as general average; how the case would stand as between the shipper and shipowner is not defined. It appears that the shipper whose goods have been placed on deck without his knowledge, has a double remedy in case of jettison; he may claim as general average, or he may claim direct from the shipowner.

It is to be presumed that this clause only refers to claims on the part of the shipowner. This may be inferred from § 733, where it is laid down that if the master, without the knowledge of the shipper, improperly loads certain goods on the deck, and these goods are afterwards jettisoned, the shipper may recover his loss as general average, leaving all parties concerned a right of ultimate recovery from the ship or master. Here, under the form of a particular instance, we have the principle laid down in the German law—that the party in fault not only is excluded from the benefit of contribution towards his own loss, but must ultimately make good to each other contributor that which he has been obliged to contribute by reason of his fault; the contribution itself, as amongst the innocent parties, remaining intact. Any other

§ 734. Indien niettegenstaande het werpen van goederen of het kappen van scheepstuigen, het schip vergaat, heeft geen omslag tot vergoeding plaats.

De behouden geblevene of geborgene goederen zijn niet gehouden tot betaling of tot vergoeding van geledene schade van de voorwerpen, die geworpen, beschadigd of gekapt zijn.

§ 735. Indien het schip door het werpen of kappen behouden blijft, en naderhand bij het vervolgen zijner reis vergaat, en alsdan goederen geborgen worden, dragen alleen de geborgene goederen in de werping, naar de waarde welke zij alsdan hebben, na aftrek van de bergloonen.

§ 734. In case that, notwithstanding the jettison of the goods or the cutting away of the ship's tackle, the ship is lost, no contribution shall take place.

The goods which escape, or are salvaged, are not liable to contribute towards making good the loss suffered by the articles thrown overboard, damaged, or cut away.

§ 735. In case the ship is preserved by means of the jettison or cutting away, and afterwards, in prosecuting her voyage, is lost, and goods are eventually saved, the saved goods (*g*) alone contribute to the jettison, according to the value which they then have, after deduction of the cost of salvage (*h*).

rule must occasionally work an injustice—*e.g.*, in case of jettison of cargo from an unseaworthy ship, there clearly ought to be contribution as amongst the owners of cargo, supposing the shipowner to be insolvent.

With regard to the jettison of deck-load to lighten a ship in case of stranding, Dr. Rahusen says that there has been on this point no legal decision in the Dutch Courts, and it is hardly possible to say what the Courts would decide; but that he himself is accustomed to allow such jettison as general average. He cannot, however, say that there exists any decided custom on this point.

(*g*) Goods sold at a port of refuge on account of damage do not contribute to any subsequent average disaster.

(*h*) "*Cargo sold in a port of refuge has not to bear the general average alone if ship and cargo are lost later.*—The ship *Maria Agnes*, on her voyage from Java to Holland, sustained such damages (in part general average) that she had to put into Simon's Bay as a port of refuge. Part of the cargo of coffee there showed signs of damage, and was therefore sold by the captain, who now did not raise money for the repairs of the ship on the credit of the shipowner, but met the expenses of repairs by the proceeds of the sale. On the further voyage both ship and cargo were totally lost, and the adjusters appealed to § 735 as a ground for bringing the proceeds of the cargo sold at Simon's Bay, being a saved object, into general average. The tribunal resorted to for the final decision of the dispute condemned the shipowner to reimburse the proceeds of the sale in Simon's Town, deducting the full freight falling on that part of the cargo, but decided, too, that there was no case for general average. The sale of the damaged cargo had taken place in the port of refuge, under the management of the captain acting as *negotiorum gestor* for the owners of the cargo. Consequently the captain is

§ 736. Indien het schip en de lading, door kappen of andere schade aan het schip toegebracht, behouden blijven, doch de goederen naderhand vergaan of geroofd worden, heeft de schipper geene aanspraak op de eigenaars, inladers of geconsigneerden dier goederen, om in den omslag dier kapping of schade te dragen.

§ 737. Indien de goederen door schuld of toedoen van den inlader of geconsigneerde verloren gaan, dragen zij evenwel in de gemeene avarië.

§ 738. In geen geval, behoeft de eigenaar eener lading in gemeene avarië meer te dragen, dan de waarde der goederen, zoo als die bij derzelve aankomst waardig zijn; onverminderd zoodanige kosten als, na het vergaan van het schip of de opbrenging en aanhouding der goederen, door den schipper te goeder trouw, zelfs zonder last, zijn gedaan, om van het vergane iets te redden, of de opgebragte goederen te reclameren, al ware zulks zonder goed gevolg.

§ 739. Indien, na den gedanen omslag, de geworpene goederen

§ 736. In case the ship and cargo are preserved by the cutting away or other hurt done to the ship, but the goods afterwards are lost or stolen, the captain has no claim against the owners, shippers, or consignees of such goods for contribution towards such cutting away or hurt.

§ 737. In case the goods are lost through the fault or act of the shipper or consignee, they shall still contribute to the general average.

§ 738. In no case must the owner of goods bear in general average a larger amount than the value of his goods in the condition in which they arrive; excepting such expenses as, after the wreck of the ship, or capture or detention of the cargo, are incurred by the captain in good faith, even without orders, in order to save something from the wreck, or to reclaim the captured goods, although the attempt may have been ineffectual.

§ 739. If after the assessment, the goods thrown overboard have

bound to refund the proceeds, and cannot maintain that it belonged to the value of the lost ship and went down with it. Also the abandonment of ship and freight in this case was not permissible, but the responsibility of the owner was a personal one. As to the applicability of § 735, it cannot be concluded from it that—because *goods saved* have to contribute to a general average, even if the vessel is totally lost after those measures of safety have been taken—that goods also which have been sold in a port of refuge on account of particular damage should alone contribute to the general average in case of the loss of ship and cargo. (Mag. v. H., x. p. 5.)”—(Ul. p. 113.)

door de eigenaars zijn terug bekomen, zijn zij gehouden hetgeen zij voor dezelve in de verdeeling ontvangen hebben, aan den schipper en de belanghebbenden bij de lading in te brengen, onder aftrek der schade, onkosten en bergloonen.

In dat geval, wordt de gemelde inbreng door het schip en de belanghebbenden in dezelfde evenredigheid genoten, als zij in de schade der werping hebben gedragen.

§ 740. Indien de eigenaar der geworpene goederen dezelve terug bekamt, zonder eenige vergoeding te vorderen, draagt hij, in geen geval, in de gemeene avarij, na de werping aan de behouden geblevene goederen overgekomen.

BOEK II. TIT. V.

VAN BEVRACHTING.

§ 478. De bevrachter of inlader is, in geval de schipper genoodzaakt is gedurende de reis het schip te laten vertimmeren, gehouden de vertimmering af te wachten, of (des verkiezende) de lading, tegen voldoening van de geheele vracht en de verschuldigde avarij-grosse, en onder de bepalingen bij Artikel 511 voorgeschreven, naar zich te nemen.

Hij is, gedurende den tijd der

been recovered by the owners, these are bound to return to the master, and the parties concerned in the cargo, what has been assigned to them for the same by adjustment, under deduction of damage, charges, and salvage.

In such case the ship and parties concerned participate in what is thus brought in, in the same proportion in which they have contributed for the loss by the jettison.

§ 740. If the owner of the goods thrown overboard recovers the same without claiming any indemnity, he in no case contributes to general average sustained after the jettison by the goods which have remained safe.

BOOK II. TIT. V.

OF AFFREIGHTMENT.

§ 478. In case the captain is obliged, during the voyage, to have his ship repaired, the freighter or shipper is bound to await the repairing, or (at his election) to take away his goods on payment of the full freight and the general average that is due, and on complying with the conditions of Art. 511 of this Code (i).

During the time of the repairing

(i) That is, he must likewise make good any expense which his withdrawal of his property may occasion, such as the breaking out and restoring of other portions of the cargo to get at them.

vertimmering, geene vracht verschuldigd, indien het schip bij de maand vervracht is, noch vermeerdering van vracht, indien de vervrachting voor de reis geschied is.

Wanneer het schip niet mogt kunnen worden vertimmerd, is de schipper gehouden, voor zijne rekening en zonder verhooging van vracht te mogen eischen, een ander schip of andere schepen te huren, om de lading naar de bestemmingsplaats te vervoeren.

Indien de schipper geen ander schip of schepen, op te plaats of nabij gelegene plaats, heeft kunnen bekomen, is hem de vracht niet verder verschuldigd dan in evenredigheid van de reeds afgelegde reis.

In dit laatste geval blijft de zorg voor de voordere vervoering der goederen aan elk der inladers overgelaten; onverminderd de verplichting van den schipper, om hen niet alleen van den staat der zaken te doen kennis dragen, maar ook om alle tusschen tijds vereischt wordende maatregelen, tot behoud der lading, in het werk te stellen.

Alles, ten zij door partijen anders mogt zijn bedongen.

§ 480. Indien de schipper zich, naar aanleiding van Art. 372, in de noodzakelijkheid heeft bevonden, goederen te verkoopen, is de vracht van die goederen verschuldigd, bij behoudene aankomst van het schip,

no freight is due in case the ship is freighted by the month, nor any augmentation of freight in case it is by the voyage.

If the ship cannot be repaired, the captain is bound, on his own account and without having any claim for enhancement of freight, to hire another ship or ships, in order to forward the cargo to its place of destination.

In case the captain is unable to procure another ship or ships on the spot or in any place in the neighbourhood, he is entitled to no further freight than in proportion to the distance completed.

In the latter case, the responsibility for the forwarding of the goods is transferred to each of the shippers; saving the duty of the captain, not only to inform them of the state of affairs, but also to direct the carrying out of all such measures as may in the meantime be requisite for the safety of the goods.

All this, unless the parties have otherwise stipulated.

§ 480. In case the captain, acting in conformity with Art. 372 (*k*), is under the necessity of selling goods, the freight due in respect of such goods is, in the event of the ship's safe arrival, the whole,

(*k*) Art. 372 gives directions with regard to the sale of cargo, in case of need, at a port of refuge, in order to raise funds for necessities to enable the ship to complete the voyage.

geheel, en bij verongelukking van hetzelfde, naar evenredigheid der afgelegde reis.

§ 481. De vracht is mede verschuldigd van de goederen, die tot algemeen behoud over boord zijn geworpen, in zoo verre de verdeling tot het dragen der schade, door de werping veroorzaakt, volgens dit Wetboek plaats moet hebben.

§ 482. Van goederen door schipbreuk, stranding of door andere overmagt vergaan, of door zee-roovers of vijanden genomen, is geen vracht verschuldigd.

De bevrachter kan zelfs de teruggave vorderen van hetgeen op rekening is betaald, indien het tegendeel niet is bedongen.

§ 483. Schip en lading gerantsoeneerd of vrijgekocht, of goe-

and in the event of her loss, a proportion according to the distance run (*l*).

§ 481. Freight is also due for the goods which have been thrown overboard for the general safety, so far as the contribution for the loss caused by the jettison has, according to the rules of this Code, to be made.

§ 482. For goods lost through shipwreck, stranding, or other disaster, or taken by pirates or enemies, no freight is due.

The shipper is, on the contrary, entitled to a return of whatever freight has been paid in advance, unless it has been stipulated to the contrary.

§ 483. If ship and cargo are recaptured and ransomed, or goods

(*l*) If the ship is able to carry the goods, but if part of the cargo, being sea-damaged, is necessarily sold at a port of refuge by the captain's orders, the whole freight is due on such portion. This rule is based on the following principles: First, the captain, acting as agent for the owner of the cargo, and acting on his behalf by selling a part of the cargo, thereby realizing what may be earned, and avoiding a total loss of that part of the cargo, must never be himself a loser from faithfully performing his duty. Secondly, it is highly desirable for the cargo in general that any sea-damaged portion should be left behind in the port of refuge, and the captain ought not to be brought into a struggle between his conscience and his pocket.

If, however, the full cargo is sold at the port of refuge by reason of its being sea-damaged, the captain would only have a right to *pro ratâ* freight, the voyage being broken up, and the captain remaining at liberty to make a new charter and to sail whither he likes.

Custom, however, has introduced in both these cases this mitigation—that, if cargo is sold in the port of refuge, the owner never is liable for more freight (be it full freight or *pro ratâ* freight) than the proceeds of the cargo sold. It is, however, more or less questionable whether this custom would be maintained in Court, if the captain brought an action against the shipper for the balance of freight. This mitigation does not apply to the case when the goods arrive at the port of destination.

deren, na schipbreuk, geborgen zijnde, is, voor zoo verre de reis niet kan worden ten einde gebragt, de vracht verschuldigd tot de plaats, waar het schip genomen of de schipbreuk geleden is, in evenredigheid der bedongene vracht.

De vrijgekochte of gerantsoepeerde goederen, ter plaatse der bestemming door den schipper bezorgd wordende, heeft de vervoerster of de schipper regt tot de geheele vracht.

In de gevallen bij het eerste en tweede lid van dit artikel voorzien, draagt de vervoerster of de schipper in den losprijs of in het bergloon, bij wijze van avarij-grosse.

§ 484. Van goederen, tot de lading van een schip behoord hebbende, die, buiten eenig toedoen van den schipper, het zij in zee of langs stranden, worden opgevischt en geborgen, en vervolgens aan de belanghebbenden uitgeleverd, is geene vracht verschuldigd.

§ 487. De vervoerster of schipper vermag, voor de vracht, onkosten en avarij-grosse, de goederen niet aan boord te houden.

Hij heeft regt om den opslag en de bewaring onder eenen derde te vorderen, tot dat de vracht, onkosten en avarij-grosse zijn voldaan, en indien de goederen

after shipwreck have been saved, and if the voyage cannot be completed, freight is due to the place where the ship was captured or where the shipwreck occurred, in proportion to the freight stipulated for.

If the salvaged or ransomed goods are forwarded by the captain to the place of destination, the shipowner or captain is entitled to the full freight.

In the cases provided for by the first and second sections of this article, the shipowner or captain must bear his share of the ransom or salvage, in the way of general average.

§ 484. For goods forming part of a ship's cargo, which, without any act on the part of the captain, have been fished up or saved at sea or along the coast, and afterwards delivered to the proprietors, no freight is due (*m*).

§ 487. The shipowner or captain has no right to detain the goods on shipboard as security for freight, expenses, and general average.

He has the right to have the goods retained in the hands of a third party until the freight, expenses, and general average are satisfied, and, in case the goods are

(*m*) When goods arrive at their destination so damaged as not to be worth the freight, full freight is due. As to liquids, however, empty or nearly empty casks may be abandoned for the freight, as in France and Belgium.

bederfelijk zijn, kan hij derzelver verkoop vorderen.

Indien de avarij-grosse niet spoedig kan begroot werden, heeft hij regt om te vorderen, dat eene billijke som, ter bepaling van den regter, daarvoor inmiddels onder geregtelijke bewaring gesteld worde.

perishable, he may require their sale.

In case the general average cannot immediately be adjusted, he has the right to demand that a reasonable sum, to be determined by the judge, shall in the meantime be placed under judicial custody.

Dr. Rahusen has supplied particulars of several decisions in Holland on the construction of the York-Antwerp Rules, 1890. Five of these decisions relate to Rule VII., which provides that "damage caused to machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage."

The first case is *The Ethelaida* (n), decided by the Permanent Committee of Arbitration in Amsterdam. The Committee held that there was no proof that the steamer was in a position of peril, and that it did not appear that the captain actually intended to float the ship for the common safety at the risk of damage to the engines, at the moment when he tried to float the ship by forcing the engines. The decision is one of fact; but Dr. Rahusen observes: "When does an actual intention to float the ship for the common safety, at the risk of such damage, appear? I should say that the proof of the captain being aware of the possible results is the fact of his endeavouring to float the steamer by working the engines. Then is a formal declaration by the captain, that he is aware of the risk, necessary before the working of the engines?"

The second case is *The Manchester* (o). The ship stranded in the Dardanelles in avoiding a collision with another vessel. The Court at Rotterdam held that the "position of peril" must be an immediate and threatening peril for ship and cargo. The Court then stated the following facts: (1) That the captain tried to refloat the steamer by using his own resources; (2) That he succeeded; and (3) That he did not require outside assistance; and inferred from these three facts that there had been no immediate and threatening danger. This judgment was confirmed by the Court of Appeal at the Hague (p), which added

(n) Weekblad van het Recht, No. 6477.

(o) *Ibid.*, No. 7185.

(p) *Ibid.*, No. 7244.

to the reasons of the Court below the curious reason that it did not appear from the documents before the Court that the captain had the intention to damage his engines. "I consider both decisions wrong," says Dr. Rahusen, "the former because the Rule does not require an immediate and threatening peril, and the latter because the risk of damage was sufficient, and of course no intention to cause damage was required."

In the third case, *The Magnet* (q), the Court of Rotterdam again applied the test of immediate danger.

The fourth case is *The Llanberis* (r). In this case the ship stranded upon a beach, was lightened, and got off by the use of the engines; and the Court of Rotterdam, consisting of three judges, other than those who had decided the former cases, held: (1) That as regards general average there must be a danger threatening damage to or loss of ship and cargo, but it is not necessary that the danger should be an immediate threatening danger, *i.e.*, so immediately threatening that the damage or loss would be unavoidable if the measure were not taken immediately. (2) That the captain when he put the engines in motion must be considered as having acted "at the risk of such damage" within the meaning of Rule VII., because an experienced captain must have known that the use which was made of the engines while the *Llanberis* was fixed upon the ground involved the risk of such damage as was caused to the engines. More than this is not required by the words of Rule VII., and especially not that the risk of damage must appear by extrinsic circumstances. "I think," Dr. Rahusen adds, "that this judgment gives a perfect exposition of Rule VII., and that it is fortunate that the former view of the Court of Rotterdam has been abandoned."

In the fifth case, *The Hambleton* (s), the same Court followed its decision in *The Llanberis*.

There are also decisions upon Rule VIII., which provides that "when a ship is ashore, and, in order to float her, cargo, bunker coals, and ship's stores, or any of them are discharged, the extra cost of lightening, lighter-hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average." Both the Court of Rotterdam, in *The Othon Statatos*, and the Arbitration Committee of Amsterdam, in *The Addington* (t) and *The Delfland*, have held that, for the application of this Rule, it is not necessary that the ship should be in peril. It is sufficient that she is ashore.

(q) Weekblad van het Recht, No. 7258.

(r) *Ibid.*, No. 7959.

(s) *Ibid.*, No. 8224.

(t) Mag. v. H., xiii. p. 132.

APPENDIX M.

THE LAW OF ITALY.

The Italian Codice di Commercio passed into law in April, 1882, and came into force in January, 1883, replacing the Code of 1865. It is given here so far as concerns general average. For the revision of the notes, the editors are indebted to Mr. Ernesto Angelo Pizzorno, Average-Adjuster, of Genoa.

TIT. VII. CAP. I.

DELLE AVARIE.

642. Sono avarie tutte le spese straordinarie fatte per la nave e per il carico unitamente o separatamente, e tutti i danni che accadono alla nave ed al carico, dopo il caricamento e la partenza sino al ritorno ed allo scaricamento.

Le avarie sono di due specie, avarie grosse o comuni, e avarie semplici o particolari.

Non sono avarie, ma semplici spese a carico della nave, le spese ordinariamente necessarie per entrare nei seni, nei fiumi o nei canali, o per uscirne, e le spese per diritti e tasse di navigazione.

In mancanza di convenzioni speciali tra le parti, le avarie sono regolate secondo le disposizioni seguenti.

643. Sono avarie comuni le spese straordinarie fatte, ed i danni sof-

TIT. VII. CAP. I.

OF AVERAGE.

642. All extraordinary expenses incurred by ship and cargo, conjointly or separately, and all damage happening to ship and cargo, from the loading and setting sail until the arrival and discharge, are averages.

Averages are of two kinds, gross or general average, and simple or particular average.

Ordinary costs of entering or leaving bays, rivers, or canals, and navigation dues, are not averages, but simple charges to be borne by the ship.

In the absence of special agreements between the parties, averages are adjusted by the following rules.

643. General average are the extraordinary expenses incurred,

ferti volontariamente per il bene e per la salvezza comune della nave e del carico.

Tali sono:

1°. Le cose date per composizione e a titolo di riscatto della nave e del carico;

2°. Le cose gettate in mare per salvezza comune;

3°. Le gomene, gli alberi, le vele o altri attrezzi tagliati per salvezza comune, e quelli rotti in conseguenza delle operazioni fatte per salvezza comune;

4°. Le ancore, catene, ed altri oggetti abbandonati per la salvezza comune;

and the damages voluntarily sustained for the good and for the common safety of ship and cargo.

Such are:

1. Things given by way of composition or as ransom for the ship and the cargo;

2. Things thrown into the sea for the common safety;

3. Cables, masts, sails, or other apparel cut away for the common safety (*a*), and things broken in consequence of measures taken for the common safety;

4. Anchors, chains, and other articles abandoned for the common safety (*b*);

(*a*) The law provides that the cutting away, and subsequent jettison of the masts for the common safety of ship and cargo, are to be considered general average. But when the masts and gear have already been broken by the gale or the high seas, that is to say, in a case of accident or *force majeure*, and their jettison for the common safety is subsequently decided, it is reasonable that all the damage is not to be deemed general average. In this state of things, it is necessary to separate the two consecutive casualties. The breakage of the mast in consequence of the storm is particular average on ship. But when the mast, fallen down on deck, jeopardizes the general safety of the property at risk by beating against the ship's sides or hindering her navigation, and the cutting away and jettison of it is consequently decided, then the sale value of the mast and gear in their damaged state after the accident will be made good by contribution.

(*b*) "The law says nothing about deduction to be made for the difference between new and old. But the following seems to be the custom of the adjusters in the majority of cases:—

"No deduction from the amount of repairs to a ship if she is on her first voyage. Later on, a third is deducted for difference between new and old.

"There is deducted in case of new copper sheathing—

"One-fifth for every year employed in voyages in Europe and the Atlantic.

"One-fourth for every year in the Pacific.

"One-third for every year in the Indian Ocean.

"If the sheathing in a foreign country is unusually dear, the price of its first being put on must be taken.

"From the price of new anchors and chains replaced, according to Genoese custom there is no deduction made, but in other places a sixth." (Ul. p. 141.)

5°. I danni cagionati dal getto alle cose rimaste nella nave;

6°. I danni cagionati alla nave nell' operazione del getto, volontariamente o per conseguenza necessaria di esso; i danni recati alla nave per facilitare il salvataggio del carico o per agevolare lo scolo o l' esaurimento delle acque; e i danni che ne derivarono al carico;

7°. I danni cagionati alla nave ed il carico nelle operazioni dirette ad estinguere un incendio a bordo;

8°. Le spese di cura e di vitto per le persone ferite in difesa della nave, e le spese funebri in caso di morte delle persone stesse;

9°. I salarii e il vitto delle persone dell' equipaggio durante l' arresto o l' impedimento, quando la nave è arrestata in viaggio per ordine di una Potenza, o è costretta a trattenersi in un porto per sopravvenienza di guerra o altra simile causa che impedisca il viaggio al porto di destinazione, finchè la nave ed il carico non sono svincolati dalle loro reciproche obbligazioni;

10°. Le spese di entrata od uscita e le tasse di navigazione pagate in un porto dove la nave ha dovuto far rilascio forzato per causa di tempesta, caccia di nemici o pirati,

5. Damage occasioned by the jettison to the things remaining on board;

6. Damage occasioned to the ship in the operation of the jettison voluntarily or by necessary consequence thereof; damage done to the ship in order to facilitate the saving of the cargo, or to assist the escape or pumping out of water; and damage thereby done to the cargo;

7. Damage caused to ship and cargo by the measures taken to extinguish a fire on board (c);

8. The costs of curing and boarding persons wounded in defence of the ship, and funeral expenses in case of the death of any of them.

9. The wages and board of the crew during arrest or embargo of the ship, when the ship is detained on the voyage by order of any State, or is compelled to put into a port through the breaking out of war or other similar cause which hinders the voyage to the port of destination, provided the ship and the cargo are not released from their reciprocal obligations;

10. The expenses of entry and exit, and the harbour dues, paid in a port in which the ship has been obliged to take refuge by reason of tempest, pursuit by

(c) A new article in accordance with York-Antwerp Rule III.

o vena d' acqua cagionata da caso fortuito o da forza maggiore;

11°. I salarii e il vitto delle persone dell' equipaggio in un porto di rilascio forzato, durante il tempo delle riparazioni necessarie a proseguire la navigazione, quando le riparazioni costituiscano avaria comune;

12°. Le spese di scaricamento e ricaricamento degli oggetti messi a terra per eseguire le suddette riparazioni della nave in un porto di rilascio forzato, le spese di custodia e i fitti dei magazzini ove gli oggetti stessi furono depositati;

13°. Le spese fatte per ottenere la liberazione o la restituzione della nave arrestata, se l' arresto non procedette da causa riguardante esclusivamente la nave o le persone del capitano, del proprietario

enemy or pirate, or leak occasioned by accident or *vis major*;

11. The wages and board of the crew in a port of refuge, during the time of the repairs necessary in order to proceed on the voyage, if the repairs constitute general average (*d*);

12. The expenses of discharging and reloading goods sent ashore(*e*) in order to execute the above-mentioned repairs of the ship in a port of refuge, the costs of their safe keeping, and the hire of warehouses to deposit the said goods in (*f*);

13. Expenses incurred to obtain the release or restitution of a ship under arrest, if the arrest did not proceed from a cause which affected exclusively the ship or the persons of the captain, owner, or

(*d*) It is now the practice also to treat as general average the expenses of temporary repairs of particular average when the ship is unable without repairs to prosecute the voyage, and when permanent repairs are not possible, or would occupy so much time as to prejudice the result of the voyage. From the general average, however, the benefit derived, in making the permanent repairs, from the temporary repairs must be deducted

(*e*) "If some part of the cargo discharged at a port of refuge is obliged to be left there because of not being able to be again loaded on board (as for instance, from want of experienced stevedores), it is usual to reckon as general average the loss sustained by the owners of the goods on their sale, as well as the loss of freight caused thereby to the shipowner." (Ul. p. 142.)

(*f*) When for the repair of particular average sustained by the ship in consequence of accident or *force majeure*, it is necessary to unload the cargo, or a part thereof, the expenses of discharging and warehousing are particular average on the goods landed. (Court of Appeal of Genoa, 11th April, 1890; Temi Genovese, 1890, 243.)

The expenses of unloading and reloading the goods discharged are not general average when incurred for the purpose of carrying out any repairs to the ship to enable her to prosecute the voyage, but only when incurred for the purpose of repairs which in themselves are general average. (Commercial Court of Cassation, 7th June, 1900; Act, 1900, 825.)

o dell' armatore, ed i salarii e il vitto delle persone dell' equipaggio durante il tempo necessario per ottenere tale liberazione e restituzione, se questa si è ottenuta;

14°. Le spese di scaricamento per alleggerire la nave quando ciò abbia dovuto farsi per tempesta, o per altro motivo di comune salvezza della nave e del carico; e i danni che la nave od il carico ha sofferto nella operazione di scaricamento e ricaricamento;

15°. I danni sofferti dalla nave o dal carico nell' investimento prodotto volontariamente per salvare la nave da tempesta, da preda, o da altro pericolo imminente;

16°. Le spese fatte per rimettere a galla la nave investita nel caso espresso nel numero precedente, e le ricompense dovute per le opere e i servigi prestati in tale occasione;

ship's husband; and the wages and board of the crew during the time necessary to obtain such release and restitution, if it has been obtained;

14. The expenses of discharging to lighten the ship when rendered necessary by storm, or other motive of common safety for ship and cargo; and the damage which the ship or the cargo (*g*) may sustain in the operations of discharging and reloading;

15. Damage sustained by the ship or by the cargo in a stranding brought about voluntarily to save the ship from storm, capture, or other imminent peril (*h*);

16. Expenses incurred in floating off a ship stranded in the case provided for by the preceding number, and compensation paid for work and services rendered on such occasions (*i*);

(*g*) "Any damage caused to the cargo in consequence of its being discharged and reloaded in a port of refuge belongs also to general average, if such damage can clearly be traced to that circumstance. A deficit customary to such goods in the ordinary course of the voyage is not made good, and must be deducted from the loss certified at the port of refuge." (Ul. p. 143.)

(*h*) "This damage is not admitted into general average if the ship is not brought off." (Ul. p. 143.)

The general rule is that the voluntary stranding of a ship for the purpose of saving her from an imminent danger is general average, and if it ceases to be so when it has been caused by the inherent vice or age of the ship, or by the fault or negligence of the captain, this constitutes an exception which is to be proved by the party alleging it. (Court of Appeal of Genoa, 26th February, 1886; *Eco Giur.* 1886, 97.)

The stranding of a ship to save the crew, ship and cargo is general average. (Court of Cassation of Palermo, 28th November, 1896; *La Legge*, 1897, 1, 263.)

(*i*) "Although § 16 only touches upon a 'voluntary' stranding, still the adjusters treat the costs there spoken of as general average, even in an 'accidental' stranding. Not only the expenses incurred for the bringing off of the stranded vessel (including even the price of coal and supplies for the engine in steamers), but also any damages

17°. La perdita e i danni sofferti dalle cose messe sulle barche per alleggerire la nave nei casi indicati nel numero 14°, comprese le quote di contribuzione che si dovessero alle barche stesse, e reciprocamente i danni sofferti dagli oggetti rimasti a bordo della nave, in quanto tali danni siano considerati avarie comuni;

18°. I premi e gli interessi del cambio marittimo contratto per far fronte alle spese annoverate tra le avarie comuni, e i premi di assicurazione delle dette spese, come pure la perdita che dovesse rimborsarsi al proprietario delle cose caricate vendute durante il viaggio in un porto di rilascio forzato per far fronte alle spese stesse:

19°. Le spese del regolamento delle avarie comuni.

Non sono considerati avarie comuni, ancorchè incontrate volontariamente per il bene e la salvezza comune, i danni sofferti dalle nave o le spese fatte per essa, quando provengano da vizio o vetustà della nave ovvero da colpa o da negligenza del capitano o dell' equipaggio.

Gli attrezzi e gli altri oggetti di corredo e d' armamento della nave gettati in mare e le àncore, le catene od altri oggetti abban-

17. Loss and damage sustained by things placed in boats in order to lighten the ship in the case expressed in No. 14, including the amount of any contribution they may owe to the boats themselves, and reciprocally any damage sustained by the things remaining on board the ship, so far as such damage is to be deemed general average;

18. Premiums and interest on bottomry loans contracted to raise funds for expenses classified as general average, and the cost of insuring such bottomry loans or the advance for such expenses, as likewise the loss which must be reimbursed to the proprietors of cargo sold in a port of refuge to raise funds for such expenses;

19. The expenses of the adjustment of the general average (*k*).

Not considered general average, though incurred voluntarily for the common good and safety, are damage suffered or expenses incurred by the ship, when they were occasioned by the defect or old age of the ship, or by the fault or neglect of the captain or crew (*l*).

Rigging and any other ship's furniture and apparel jettisoned, and anchors, chains, and other things slipped, though voluntarily

caused for the same object, are general average. To the latter belong damage to or losses of anchors, chains, sails, or machinery, if these have obviously arisen from the bringing off shore." (Ul. p. 143.)

(*k*) "Damage caused to ship's appurtenances and cargo by *press of sail* is considered general average." (Ul. p. 144.)

(*l*) See *infra*, p. 610, note (*f*).

donati, ancorchè volontariamente per il bene e la salvezza comune, non sono calcolati nella ripartizione delle avarie, se non in quanto si trovino debitamente descritti nell' inventario di bordo, tenuto secondo le disposizioni dell' articolo 500.

Il getto delle provvigioni di bordo non può essere considerato in nessun caso come avaria comune.

644. Sono considerati come avarie comuni:

1°. Il prezzo o l' indennità di riscatto delle persone dell' equipaggio mandate a terra per servizio della nave e fatte prigioniere o ritenute in ostaggio;

2°. Le spese d' una quarantena straordinaria non preveduta all' epoca del contratto di noleggio, se essa colpisce egualmente la nave ed il carico, compreso il salario e il vitto delle persone dell' equipaggio durante la quarantena.

645. Se vi è necessità di far getto, le cose meno necessarie, le più pesanti e di minor valore devono, per quanto è possibile, essere gettate le prime, ed in seguito quelle del primo ponte, e successivamente le altre.

646. Sono avarie particolari tutti danni sofferti e tutte le spese fatte

for the common good and safety, are not included in the average statement, if not found duly described in the inventory on board, kept according to § 500 (*m*).

In no case is jettison of provisions on board regarded as general average (*n*).

644. Are considered as general average:

1. The expenses of ransoming any of the crew sent ashore in the service of the ship, and made prisoner or kept as hostage;

2. The expenses of an extraordinary quarantine not provided for in the contract of affreightment, if it affects equally the ship and cargo, including the wages and board of the crew during the quarantine.

645. If there is need of a jettison, the things less necessary, of the greatest weight and least value, should as far as possible be first thrown over, afterwards those from below deck, and so on successively.

646. To particular average belong all damage suffered, and all

(*m*) Art. 500 gives minute instructions as to the carrying of log-books, &c.

(*n*) The justice, or even reason, of this clause, which was not in the former Code, is not clear, but a reference to § 648 leaves no doubt that it is a deliberate change. (See § 648 and note.)

per la sola nave o per il solo carico.

Tali sono:

1°. Qualunque perdita o danno sofferto dalle cose caricate per tempesta, incendio, preda, naufragio, investimento, rottura, o altro qualsiasi caso fortuito o di forza maggiore;

2°. La perdita degli alberi, delle gomene, delle àncore, delle vele, e delle corde, e qualunque altro danno sofferto dalla nave per le cause espresse nel numero precedente;

3°. Qualunque danno sofferto per vizio proprio della nave o del carico;

4°. Le spese di qualunque approdo cagionato da vizio della nave, da vena d' acqua proveniente da vetustà, da mancanza di provvigioni di bordo, o da causa qualunque imputabile all' armatore o al capitano;

5°. Il salario e il vitto dei marinai durante la quarantena ordinaria, o durante le riparazioni provenienti da vizio o vetustà della nave o da altra causa imputabile al proprietario, all' armatore o al capitano, o durante l' arresto o la stazione in un porto che riguardi la sola nave o il solo carico, e le spese per ottenere in questo caso la liberazione dell' una o dell' altro;

6°. Le spese fatte per conservare le cose caricate o riparare i

expenses incurred, for the ship alone, or for the cargo alone.

Such are:

1. Any loss or damage sustained by the cargo through storm, fire, plunder, shipwreck, stranding, breakage, or other the like accident or *vis major*;

2. The loss of spars, hawsers, anchors, sails, ropes, or any other damage suffered by the ship through the causes expressed in the preceding number;

3. Any damage sustained through the *vice propre* of the ship or of the cargo;

4. The expenses of any putting into port occasioned by a defect of the ship, by leakage proceeding from old age, by want of provisions on board, or by any other cause imputable to the ship's husband or the captain;

5. The wages and board of the seamen during the ordinary quarantine, and during repairs resulting from the defect or age of the ship or other cause imputable to the owner or ship's husband or captain, or during an arrest or detention in a port which concerns the ship alone or the cargo alone, and the expenses of obtaining in such a case the release of the one or the other;

6. Expense incurred for the preservation of the cargo, or to repair

fusti, le casse o gli involti in cui sono contenute, quando queste spese non procedano da danni considerati avarie comuni;

the bales, cases, or wrappings which contain it, when these expenses do not proceed from such damage as is deemed general average;

7°. L' eccedenza del nolo nel caso espresso nell' articolo 570.

I danni accaduti alle cose caricate per accidenti provenienti dalla negligenza del capitano o delle altre persone dell' equipaggio sono avarie particolari a carico del proprietario delle cose stesse, salvo il regresso verso il capitano o sulla nave e sul nolo.

I danni provenuti ai proprietari della nave per una più lunga ed arbitraria stazione nei porti, sono risarciti dal capitano.

7. The excess of freight in the case provided for by Art. 570.

Damage caused to the cargo by accidents arising from the negligence of the captain or any of the crew is particular average to be borne by the owner of the things themselves, saving his recourse against the captain or ship and freight.

Loss occasioned to the owners of the ship from a too long and unnecessary stay in a port, is to be made good by the captain.

TIT. VII. CAP. II.

DELLA CONTRIBUZIONE.

647. Le avarie particolari sono sopportate e pagate dal proprietario della cosa che ha sofferto il danno o dato occasione alla spesa.

Le avarie comuni sono ripartite proporzionatamente tra il carico e la metà della nave e del nolo.

TIT. VII. CAP. II.

ON CONTRIBUTION.

647. Particular average is borne and paid by the owner of the thing which has sustained the damage or occasioned the expense.

General average is distributed proportionally over the cargo, and the half of ship and freight (o).

(o) “ (a) The ship contributes to general average upon the half of that value which it possesses at the end of the voyage. The half, too, of the value which has been compensated in general average is contributory.

“ (b) The freight contributes on the half of its gross amount as stated in the bills of lading.

“ (c) The cargo contributes on its value at the place of destination, minus freight, customs, landing charges, and sale expenses. If the goods reach the place of discharge in a damaged condition, then they only contribute to general average on the value they have in their damaged state.

“ Papers of value which, in the event of their loss, would not be payable, contribute also in general average. Commercial bills of exchange do not contribute.

“ (d) The lender on bottomry contributes in place of the borrower on bottomry to

I valori delle cose sacrificate vanno compresi nella formazione della massa che deve contribuire.

648. I bagagli delle persone dell'equipaggio e dei passeggeri non contribuiscono all'avarìa comune se sono salvati, e danno diritto a contribuzione se sono gettati o danneggiati.

649. Le cose caricate delle quali non vi è polizza di carico, nè dichiarazione del capitano, non sono pagate se sono gettate, e contribuiscono se sono salvate.

650. Le cose caricate sulla coperta della nave contribuiscono sempre alle avarie comuni se sono salvate.

Quando sono gettate o danneggiate per il getto, salvo il caso dei viaggi preveduti nell'ultimo capoverso dell'articolo 498, non danno azione per le perdite ed i danni, che contro il capitano che le ha caricate sulla coperta senza il consenso scritto del caricatore. In caso contrario ha luogo una speciale contribuzione tra la nave, il

The value of articles sacrificed is included in making up the sum total of contributory values.

648. Personal (*p*) effects of the crew and the passengers do not contribute to general average if saved, and can claim contribution if jettisoned or damaged.

649. Any cargo for which there is no bill of lading nor declaration of the captain, is not paid for if jettisoned, and contributes if saved.

650. Cargo loaded on deck always contributes to general average if saved.

If jettisoned or damaged by the jettison, except in the case of voyages provided for in the last clause of Article 498 (*q*), they cannot claim compensation for losses and damage, except against a captain who has laden them on deck without the written consent of the shipper. In other cases there is a special contribution

any general average arising after the signing of the bottomry contract, and any contrary arrangement is null and void.

“§ 444. Those who lend on bottomry contribute to general averages in the place of those who borrow. Any contrary agreement is null. Particular averages, however, fall on the lenders if there is no contrary arrangement.” (Ul. p. 145.)

(*p*) The corresponding article of the former Code (§ 527) ran:—“Ammunition of war, provisions, and the personal,” &c. Compare last clause of § 643.

(*q*) Art. 498. The last clause runs:—“The captain is responsible for any damage which happens from whatsoever cause to things loaded by him on deck without the written consent of the shipper. This consent is taken for granted with regard to trips limited to the coasts of the administrative maritime department within whose boundaries they are made, and into the neighbouring department, and in the navigation of rivers and lakes.”

nolo, e le altre cose caricate sulla coperta col consenso dei caricatori, senza pregiudizio della contribuzione generale per le avarie comuni a tutto il carico.

651. Se il getto non salva la nave, non vi è luogo a contribuzione. Le cose salvate non sono soggette al pagamento delle cose gettate, nè al risarcimento del danno sofferto dalle altre.

Se il getto salva la nave e questa continuando il suo viaggio si perde, le cose salvate contribuiscono al getto secondo il loro valore nello stato in cui si trovano, dedotte le spese di salvamento.

Le cose gettate non contribuiscono in alcun caso al pagamento dei danni accaduti dopo il getto alle cose salvate.

Il carico non contribuisce al pagamento della nave perduta o resa inabile a navigare.

652. Nel caso di perdita delle cose poste in barche per alleggerire la nave, la ripartizione della perdita è fatta sulla nave e sul carico per intero.

Se la nave si perde col resto del carico, non vi è luogo a contribuzione per le cose poste sugli scafi, ancorchè arrivino a buon porto.

653. Se dopo la ripartizione le cose gettate sono riuverate dai proprietari, questi devono restituire al capitano ed agli interessati quanto hanno ricevuto per effetto

between ship, freight, and any other things laden on deck with the consent of the shippers, without prejudice to the general contribution for general average over all the cargo.

651. If the jettison does not save the ship, there is no occasion for contribution. Things saved are not bound to pay for things jettisoned, nor to compensate for damage sustained by others.

If the jettison saves the ship, and in the further course of her voyage she is lost, the things saved contribute to the jettison according to their value in the state in which they are found, deducting costs of salvage.

Things jettisoned do not contribute in any case to the payment of damage happening after the jettison to the things saved.

The cargo does not contribute to pay for the ship if she is lost or rendered innavigable.

652. In the case of things put in barges to lighten the ship, the distribution of the loss is made over ship and cargo altogether.

If the ship with the rest of the cargo on board is lost, there is no occasion for contribution from the things laden on the boats, even if they do arrive in safety.

653. If after the repartition any things jettisoned are recovered by their owners, these are bound to restore to the captain, and other parties interested, what they may

della contribuzione, dedotti i danni cagionati dal getto e dalle spese di ricuperamento.

654. La nave contribuisce per il suo valore nel luogo dello scaricamento o per il prezzo di vendita, fatta deduzione delle avarie particolari, anche posteriori all' avaria comune.

Il nolo, che, per effetto della convenzione accennata nell' articolo 577, è guadagnato anche in caso di perdita delle cose caricate, non è soggetto a contribuzione.

655. Le cose salvate e quelle gettate o altrimenti sacrificate contribuiscono in proporzione del loro valore netto nel luogo del scaricamento. Se vi è la convenzione indicata nell' articolo precedente, il nolo non si deduce dal valore.

656. La natura, la specie e la qualità delle cose che devono contribuire, e di quelle gettate o sacrificate, sono stabilite colla presentazione delle polizze di carico e delle fatture, e in mancanza con altri mezzi di prova.

Quando nella polizza di carico è simulata una qualità o è simulato un valore delle cose caricate inferiore al vero, esse contribuiscono secondo il loro valore reale se sono salvate, e si pagano in ragione della qualità e del valore indicato se sono gettate o danneggiate.

Se invece è simulata una qualità o è simulato un valore superiore al vero, le cose caricate contribuiscono in ragione della qualità o del

have received from contribution, minus the damage caused by jettison and salvage costs.

654. The ship contributes on her value at the place of discharge, or at her sale price, deducting particular averages, even if posterior to the general average.

Freight, which, by reason of the agreement alluded to in § 577, has been earned even in case of the loss of the cargo, is not subject to contribution.

655. Things saved, and those jettisoned or otherwise sacrificed, contribute in proportion to their net value at the port of discharge. If there is any agreement such as that alluded to above, freight is not deducted from the value.

656. The nature, species, and quality of the things that have to contribute, and of those jettisoned and sacrificed, are verified by the production of the bills of lading and invoices, and failing these by other means of proof.

If in the bill of lading the quality or value of the cargo is set forth at less than its real one, it must contribute according to its real value if saved, and be paid for at the rate of the quality and value indicated if jettisoned or damaged.

On the other hand, if a quality or value is pretended greater than its real one, the cargo shall contribute at the rate of the quality

valore indicato se sono salvate, e si pagano secondo il loro valore reale se sono gettate o danneggiate.

657. Il capitano deve fare processo verbale d' ogni determinazione presa e delle operazioni eseguite per la salvezza comune, appena ciò gli sia possibile.

Il processo verbale deve esprimere i motivi della determinazione ed indicare sommariamente le cose sacrificate o danneggiate; dev' essere sottoscritto dai principali dell' equipaggio od accennare i motivi del loro rifiuto, e dev' essere trascritto nel giornale nautico.

Una copia di questo processo verbale sottoscritta dal capitano dev' essere unita alla relazione indicata nell' articolo 516.

658. La descrizione, la stima e la ripartizione delle perdite e dei danni è fatta nel luogo dello scaricamento della nave a cura del capitano e per mezzo di periti nominati, nel Regno, dal presidente del Tribunale di Commercio, e in mancanza, dal pretore, e in paese estero, dall' ufficiale consolare o da chi ne fa le veci, e in mancanza, dall' autorità locale.

La ripartizione proposta dai periti è sottoposta all' esame, nel Regno, del Tribunale di Commercio, e in paese estero del regio

or value indicated if saved, and be paid for at the real value if jettisoned or damaged.

657. The captain must make a formal statement of every decision taken, and of measures effected for the common safety as soon as possible.

This statement must contain the motives of the decision, and specify the articles sacrificed or damaged; it should be signed by the chief members of the crew or give the reasons for their refusal, and must be copied in the log-book.

A copy of this statement signed by the captain should be added to the report mentioned in § 516 (r).

658. The description, valuation, and distribution of losses and damages, is drawn up at the place of the ship's discharge(s) under the captain's superintendence, and by means of experts appointed, if within the kingdom, by the president of the Tribunal of Commerce, or failing him by the judge, and in foreign countries by the consular officer or his deputy, or failing him by the local authority.

The adjustment drawn up by the experts is verified, if in the kingdom, by the Tribunal of Commerce, or in foreign parts by the

(r) § 516 contains regulations about the protests and statements, &c. that captains have to make.

(s) "If ship and cargo part company at the port of refuge, either because the voyage is given up or the ship condemned, and the cargo forwarded some other way, the adjustment should be drawn up at the port of refuge." (Ul. p. 148.)

console o di chi ne fa le veci, o dell' autorità locale competente.

consul or his deputy, or the proper local authority.

659. Non può aver luogo azione di avaria contro il noleggiatore e contro il destinatorio, se il capitano ha ricevuto il nolo e consegnate le cose caricate senza protesta, quand' anche il pagamento del nolo sia stato anticipato.

659. There is no ground for an action for average against the freighter or consignee, if the captain has received the freight and delivered the cargo without protest, even if the payment of freight had been anticipated.

TIT. I.

DELLE NAVI E DEI PROPRIETARI DELLE NAVI.

491. I proprietari di navi sono responsabili dei fatti del capitano e tenuti per le obbligazioni contratte dal capitano per ciò che concerne la nave e la spedizione. Tuttavia ogni proprietario o comproprietario che non ha contratto obbligazione personale può in tutti i casi, mediante l' abbandono della nave e del nolo esatto o da esigere, liberarsi dalla

TIT. I.

OF SHIPS AND THE OWNERS OF SHIPS.

491. The owners of ships are responsible for the acts of the captain, and bound by the obligations contracted by him, so far as concerns the ship and the adventure (*t*). In all cases any owner or part-owner, who has not contracted personal obligations, can always by the abandonment of ship and freight free himself

(*t*) The parties are permitted to derogate in the charter-party from the provision (see Art. 643 (19)), which excludes from general average losses arising from the fault of the captain.

If the non-liability of the owner for the faults of the captain is stipulated in the bill of lading, the shipowner is entitled to demand contribution from the shippers to general average occasioned by a fault of the captain, his act being considered equal, by virtue of the exemptive clause, to accident or *force majeure*. (Court of Appeal of Genoa, 26th July, 1905; Diritto Marittimo, 1906, 203.)

Clauses in the bills of lading, intended to exclude the responsibility of the shipowner for the faults both of the captain and crew, and of the ship's agents, are valid. (Court of Cassation of Turin, 10th April, 1908; F. It. 1, 128.)

A clause exempting the owner of the ship from responsibility for the fault, negligence or unskilfulness of the captain is valid. (Court of Cassation of Turin, 27th July, 1904; Temi Genovese, 1904, 513.) To the same effect (Court of Cassation of Florence, Italian Forum, 1886, 795; Court of Cassation of Rome, Italian Forum, 1895, 587), such a clause does not contain anything contrary to public policy or morality. (Court of Cassation of Naples, 9th December, 1907; R. di D. M. 1908, 81.)

The clause by which the shipowner is exempted from responsibility for the acts, both nautical and commercial, done by the captain or crew during navigation is valid. (Court of Appeal of Genoa, 14th June, 1909; Diritto Marittimo, 1909, 257.)

responsabilità e dalle obbligazioni suddette, ad eccezione di quelle per i salarii e gli emolumenti delle persone dell' equipaggio.

La facoltà di fare l' abbandono non ispetta a chi è nel tempo stesso capitano e proprietario o comproprietario della nave. Qualora il capitano non sia che comproprietario, in mancanza di speciale convenzione, egli non è tenuto personalmente per le obbligazioni da lui contratte per ciò che concerne la nave e la spedizione, che in proporzione del suo interesse.

TIT. V.

DEL PRESTITO A CAMBIO MARITTIMO.

603. Coloro che danno a cambio marittimo contribuiscono alle avarie comuni a scarico di coloro che prendono; ogni convenzione contraria è nulla.

Le avarie particolari non sono a carico di coloro che danno a cambio marittimo, se ciò non è convenuto; ma se per effetto di avaria particolare le cose vincolate al prestito non bastano a soddisfare il creditore, egli sopporta il danno che ne deriva.

TIT. IV.

DEL CONTRATTO DI NOLEGGIO.

567. Il caricatore che durante il viaggio ritira le cose caricate deve pagare il nolo per intero e tutte le spese di traslocazione cagionate dallo scaricamento.

from responsibility and the above obligations, with the exception of the wages and emoluments of the crew.

The liberty of making an abandonment does not belong to one who is at the same time captain and owner of the ship. When the captain is only a part-owner, failing any special agreement, he is not bound personally by the obligations contracted by him so far as concerns the ship and adventure, except in proportion to his interest.

TIT. V.

OF BOTTOMRY.

603. The lenders on bottomry contribute to general average instead of the borrowers; any contrary agreement is null.

Particular averages do not fall on the lender on bottomry, if not so agreed; but if by reason of particular average the things pledged are not enough to satisfy the creditor, he must bear the loss thus arising.

TIT. IV.

OF THE CONTRACT OF AFFREIGHTMENT.

567. A shipper who withdraws his goods during the voyage must pay the freight in full, and all the expenses of displacement occasioned by the discharge.

Se le cose sono ritirate per fatto o colpa del capitano, questi è risponsabile dei danni e delle spese.

570. Se il capitano è costretto per caso fortuito o forza maggiore a fare riparare la nave nel corso del viaggio, il noleggiatore deve aspettare o pagare il nolo intiero.

Se la nave non può essere riparata, il nolo è dovuto in proporzione del viaggio fatto.

Se per condurre le cose caricate alla loro destinazione il capitano noleggia un' altra nave, il nuovo noleggio s' intende fatto per conto del caricatore.

575. Il nolo è dovuto per le cose caricate che il capitano è stato costretto a vendere o dare in pegno o ad impiegare per i bisogni urgenti della nave.

Egli deve però rimborsare ai proprietari il valore che le cose stesse avrebbero nel luogo di scaricamento, se la nave è giunta a buon porto.

Se la nave è perduta, il capitano deve rimborsare ai proprietari delle cose vendute od impiegate il prezzo che ne ha ritratto, e per quelle date in pegno la somma avuta in prestito, ritenendo parimente il nolo risultante dalle polizze di carico.

È salvo in questi due casi ai proprietari della nave il diritto di far l' abbandono.

Qualora dall' esercizio di questo diritto risulti una perdita per coloro ai quali appartengono le

If the things are withdrawn through the act or fault of the captain, the latter is answerable for the loss and expense.

570. If the captain is compelled by accident or *vis major* to repair the ship in the course of the voyage, the merchant is obliged to wait, or pay the freight in full.

When the ship cannot be repaired, freight is due in the proportion of the voyage performed.

If the captain hires another ship to carry on the goods to their destination, the new affreightment is understood to be made on account of the merchant.

575. Freight is due for the cargo which the captain has been compelled to sell or give in pledge, or to employ for the urgent necessities of the ship.

He must however refund to the owners the value the things would have had at the port of discharge, if the ship arrives in safety.

If the ship is lost, the captain must refund to the owners of the things sold or used the price they have fetched, and for those pledged the sum for which they were held in pledge, retaining in like manner the freight due under the bill of lading.

These two cases are subject to the right reserved to the owners of the ship to abandon.

Whenever in the exercise of this right there results a loss on the part of those whose goods have

cose impiegate, vendute o date in pegno, la perdita è ripartita per contribuzione sul valore di queste e di tutte quelle che sono giunte alla loro destinazione, o che sono state salvate dal naufragio posteriormente agli avvenimenti di mare che hanno reso necessario l'impiego, la vendita o il pegno.

576. Il capitano ha diritto al nolo delle cose gettate in mare per salvezza comune, e che sono ammesse a contribuzione.

577. Non è dovuto alcun nolo per le cose perdute per naufragio od investimento, rapite dai pirati o prese dai nemici, ed il capitano deve restituire il nolo che gli fosse stato anticipato, se non vi è convenzione contraria.

578. Se la nave e le cose caricate sono riscattate o se queste sono salvate dal naufragio, il capitano ha diritto al nolo sino al luogo della presa o del naufragio.

Contribuendo al riscatto, egli ha diritto al nolo intero, purchè conduca le cose caricate al luogo della loro destinazione.

La contribuzione per il riscatto si fa sul prezzo corrente delle cose caricate nel luogo dello scaricamento dedotte le spese, e sulla metà della nave e del nolo.

I salarii dei marinai sono esenti dalla contribuzione.

been used, sold, or given in pledge, the loss shall be apportioned by contribution on the value of those goods, and of all that have reached their destination, or have been saved from shipwreck subsequently to the accident of navigation which has rendered necessary the use, the sale, or giving in pledge.

576. The captain has a right to freight for things jettisoned for the common safety, and which are admitted to contribution.

577. No freight is due for things lost in shipwreck or stranding, pillaged by pirates, or captured by the enemy, and the captain must restore any freight advanced to him, if there was no agreement to the contrary (*u*).

578. If ship and cargo are ransomed, or if they are saved from the shipwreck, the captain can claim freight up to the place of capture or of shipwreck.

If he contributes to the ransom, he can claim full freight if he carries the cargo to the place of destination.

Contribution to ransom is made at the market price of the cargo at the port of discharge, minus expenses, and on the half of the ship and freight.

Seamen's wages are exempt from the contribution.

(*u*) A towage agreement cannot be considered a charter-party, but is a special agreement quite distinct. Sect. 577 of the Commercial Code, by which no freight is due on things lost through wreck, cannot be applied in a case of towage. (Court of Cassation of Turin, 27th February, 1905; *Diritto Marittimo*, 1905, 241.)

579. Se la persona cui sono dirette le cose caricate ricusa di riceverle, il capitano può, coll' autorizzazione del giudice, farne vendere la quantità occorrente per il pagamento del nolo e fare il deposito delle rimanenti.

Se il prezzo ricavato non è sufficiente al pagamento, egli conserva il regresso contro il caricatore.

580. Il capitano non può ritenere le cose caricate per mancanza di pagamento del nolo.

Egli può nel tempo dello scaricamento domandare che siano depositate presso un terzo sino al pagamento del nolo.

581. In nessun caso il caricatore può domandare diminuzione del nolo.

Il caricatore non può abbandonare per il nolo le cose caricate diminuite di prezzo, o deteriorate per vizio proprio, per caso fortuito o per forza maggiore. Tuttavia, se vino, olio, od altri liquidi siano colati, le botti che li contenevano rimaste vuote o quasi vuote possono essere abbandonate per il nolo ad esse corrispondente.

579. If the party to whom the cargo is consigned refuses to receive it, the captain, with the authorization of the court, can sell enough to meet the payment of freight, and warehouse the remainder.

If the price fetched be not enough to cover freight, the captain can have recourse against the shipper.

580. The captain cannot hold back cargo for freight unpaid.

At the time of the discharge he can demand that the goods be deposited in the hands of a third party till freight is paid.

581. In no case can the shipper demand diminution of freight.

The shipper may not abandon for freight any cargo diminished in value, or deteriorated by *vice propre*, by accident, or by *vis major*. However, if wine, oil, or other liquids have run out, the casks which held them being empty, or almost empty, can be abandoned for the freight due upon them.

APPENDIX N.

THE LAW OF JAPAN.

The following extracts are from the Japanese Commercial Code, which came into force on the 16th June, 1899.

CHAPTER IV.

SEA DAMAGE.

Art. 641. General average includes all damage and expense arising from any disposition made by the master in regard to the ship or cargo to save both from a common danger.

This provision does not affect a recourse by a party interested against any person from whose fault the danger arose.

Art. 642. A general average loss must be borne by the persons interested, in proportion to the value of the ship or the cargo saved thereby, one half of the freight, and the amount of the general average loss.

Art. 643. For the purpose of general average contribution, the value of the ship is her value at the time and place of arrival, the value of the cargo is its value at the time and place of discharge; but as to the cargo, freight and expenses, which in the case of loss need not be paid, are to be deducted from its value.

Art. 644. The persons bound to contribute to the general average according to the provisions of the preceding two articles are not responsible beyond the values remaining at the time of the arrival of the ship, or of the delivery of the cargo.

Art. 645. The following things are not bound to contribute to general average:—The armament of the ship, the wages of the mariners, the supplies for them and for the passengers, and their clothing; but, nevertheless, damage to any such thing is to be contributed for by the other parties interested.

Art. 646. Damage to goods laden without a bill of lading or any documents sufficient for assessing the value of the cargo, or to appur-

tenances of the ship not included in the inventory of the appurtenances, cannot be contributed for.

The same applies to goods loaded on deck, except in the case of short coasting voyages.

The persons interested in such cargo are, however, not exempted from the liability to contribute to the general average.

Art. 647. The amount of the damage to be contributed for as general average is determined with reference to the value of the ship at the time and place of arrival, or of the cargo at the time and place of discharge, but in respect to the cargo all expenses are to be deducted whose payment has been made unnecessary by the loss or damage.

The provisions of Art. 338 apply correspondingly to general average (*a*).

Art. 648. If in bills of lading or other documents sufficient for assessing the value of cargo, the value of cargo is stated lower than its actual value, the amount of damage caused to such cargo is to be determined with reference to the value so stated.

If the value of cargo is stated higher than the actual value, the persons interested in such cargo are liable for general average in proportion to the value so stated.

These provisions apply correspondingly if a wilfully false statement has been made as to any circumstances affecting the value of the cargo.

Art. 649. If, after the parties interested have distributed the general average in accordance with the provisions of Art. 642, the owner of the ship, its appurtenances, or the cargo, recovers the whole or a part thereof, he is bound to pay back what he has received in payment, after deducting therefrom the expense of salvage and the amount of the damage arising from a partial loss or damage.

Art. 650. If, in the case of collision caused by the fault of mariners of both ships, it cannot be determined which party was more in fault, the owners of both ships shall bear the loss arising by such collision equally.

Art. 651. An obligation arising from general average or collision is extinguished by prescription after the expiration of one year.

In case of general average such period is computed from the completion of the adjustment.

Art. 652. The provisions of this chapter apply correspondingly to expenses which have been necessarily incurred because the ship has

(*a*) With regard to specie, securities and other valuables, Art. 338 provides that a carrier is not liable for damages unless the sender, at the time when he entrusted the same to the carrier for transportation, made a clear declaration of their nature and value.

been detained in the port of departure, or in the course of the voyage, by any *vis major*.

CHAPTER II.

SECTION 1.—*The Master.*

Art. 565. During the voyage the master must take such measures in respect of the cargo as are for the best interest of all the parties interested.

Any party interested may free himself from an obligation arising in respect of his goods from an act of the master, by abandoning such goods to the creditor, unless such party is himself in fault.

Art. 568. The following acts can be done by the master only to pay the expenses of repairs of the ship, assistance in case of distress, or salvage or expenses necessary to the prosecution of the voyage:—

- (1) The mortgage of the ship.
- (2) Borrowing money.
- (3) The sale or pledge of the whole or a part of the cargo, except in the case mentioned in Art. 565 (1).

In the case of a sale or a pledge of the cargo by the master, the amount of damages to be paid is determined by its value at the port of discharge at the time when it ought to have arrived, less all expenses saved thereby.

Art. 570. If the ship becomes irreparable outside of her home port, the master may sell her by public auction by permission of the maritime authorities.

Art. 571. In the following cases a ship is deemed to be irreparable:—

- (1) If the repairs cannot be made at the place where the ship is, and the ship cannot be taken to a place where they could be made.
- (2) If the cost of the repairs would be more than three-fourths of the value of the ship.

The value as specified under No. 2 is, in case the ship is damaged pending the voyage, the value which she had at the commencement of the voyage, in other case her value before the happening of the damage.

Art. 572. If necessary for the prosecution of the voyage, the master may use the cargo for the purposes of the voyage. In such case the provisions of Art. 568 (2) apply correspondingly.

CHAPTER III.

CARRIAGE BY SEA.

SECTION 1.—*Carriage of Goods.*

Art. 592. The shipowner cannot even by an express agreement be exempted from liability for damage caused by his own fault, or by the bad faith or the gross fault of a mariner or of any other person employed, or by the unseaworthiness of the ship.

Art. 598. Before the voyage has been begun, the charterer may terminate the contract on paying one-half of the freight.

If the charter includes a return voyage, and the charterer terminates the contract before the beginning of the return voyage, he must pay two-thirds of the freight. The same applies, if the ship is to come from another port to the port of loading, and the charterer terminates the contract before the departure of the ship from the port of loading.

If the charterer terminates the contract under the provisions of the foregoing two paragraphs after the whole or a part of the goods have been loaded, he must bear the expenses of their loading and discharging.

If the charterer does not load the goods within the time fixed for doing so, he is deemed to have terminated the contract.

Art. 599. Even though the contract is terminated under the provisions of the preceding article, the charterer is not exempted from his obligation to pay incidental costs and disbursements.

In the case of Art. 598 (2), the charterer must, in addition, pay any amount to be borne in proportion to the value of the goods for general average, assistance in distress, or salvage.

Art. 600. After the voyage has begun, the charterer may terminate the contract only on condition that besides paying full freight, he performs the obligations provided for in Art. 606 (1), and makes compensation for all damage arising from the discharging of the goods or gives proper security.

Art. 606. When the consignee has received the goods, he is bound to pay, according to the contract of carriage or to the tenor of the bill of lading, the freight, incidental expenses, disbursements, and any amount to be borne in proportion to the value of the goods for general average, assistance in distress or salvage.

The master must not deliver the goods except on the payment of the aforesaid sums.

Art. 607. If the consignee fails to receive the goods, the master may deposit them. In such case he must without delay give notice thereof to the consignee.

If the consignee cannot be ascertained, or if he refuses to receive the goods, the master must deposit them. In such case he must without delay give notice thereof to the charterer or shipper.

Art. 610. A shipowner, in order to obtain payment of the amount mentioned in Art. 606 (1), may by the permission of the Court sell the goods by public auction.

The shipowner may exercise this right against the goods even after the master has delivered them to the consignee; but this provision does not apply if two weeks have elapsed since the day of delivery, or if a third person has acquired the possession of the goods.

Art. 611. If the shipowner does not exercise the right mentioned in the preceding article, he loses his claim against the charterer or shipper, provided that the latter persons must make compensation so far as they have been actually enriched.

Art. 613. If the whole ship is chartered, the contract of carriage is terminated in the following cases:—

- (1) For the cause mentioned in Art. 587 (1) (b).
- (2) If the goods are lost by *vis major*.

If the cause mentioned in Art. 587 (1) (b) occurs during the voyage, the charterer must pay freight in proportion to the part of the carriage performed, but not to exceed the value of the goods.

Art. 614. If the voyage or the carriage becomes unlawful under any law or regulation, or if by reason of any *vis major* the object of the contract can no longer be accomplished, either party may terminate the contract.

If such cause occurs after the commencement of the voyage, and in consequence thereof the contract is terminated, the charterer must pay freight in proportion to the part of the carriage performed.

Art. 615. If the causes mentioned in Arts. 613 (1), No. 2, and 614 (1) affect a part of the cargo only, the charterer may load other goods in its stead, so far as the obligations of the shipowner are not thereby made more onerous.

If the charterer elects to exercise this right, he must discharge or load the goods without delay. If he neglects to do so, he must pay full freight.

(b) *I.e.*, if the ship is lost or captured, or becomes irreparable.

Art. 616. The provisions of Arts. 613 and 614 apply correspondingly to a contract of carriage relating to a part of the ship or to particular goods.

Even though the causes mentioned in Arts. 613 (1), No. 2, and 614 (1) affect only a part of the goods, the charterer or shipper may terminate the contract on payment of the full freight.

Art. 617. The shipowner may claim the full freight:—

- (1) If the master has sold or pledged the goods according to the provisions of Art. 568 (1).
- (2) If he has used them for the purpose of the voyage according to the provision of Art. 572.
- (3) If he has disposed of them according to the provisions of Art. 641.

APPENDIX O.



THE LAW OF MEXICO.

The following extracts are taken from the Commercial Code of Mexico, which became law on the 15th September, 1889, and came into force on the 1st January, 1890:—

TITLE FOURTH.

OF THE RISKS, DAMAGES, AND ACCIDENTS OF MARITIME COMMERCE.

CHAPTER I.—OF AVERAGE.

Art. 881. For the purposes of this Code, averages comprise:—

- (1) All extraordinary or accidental expenses incurred during the voyage for the preservation of the ship or cargo, together or separately.
- (2) Every injury or deterioration sustained by the ship from the time when she sails from the port of departure until she arrives and anchors in the port of destination, and all damage sustained by the merchandise from the time of loading in the port of shipment until it is discharged at the port of delivery.

Art. 882. Ordinary expenses of navigation, such as charges for pilotage on the coasts and in entering port, expenses of towage, launches, anchoring and visitation, charges of sanitary authorities, quarantine and isolation, and other port charges, the expenses of lighterage and discharging until the goods are deposited on the quay, and all other usual expenses of navigation, are considered ordinary expenses to be borne by the shipowner, unless there be an express agreement to the contrary.

Art. 883. Averages are:—

- (1) Simple or particular.
- (2) General or common.

Art. 884. In general, simple or particular average comprises all those expenses and losses incurred or sustained by the ship or its cargo,

but which did not enure for the common benefit and advantage of all the parties interested in the ship and her cargo, and especially the following:—

- (1) Loss or damage sustained by the cargo from the time of loading until its discharge, whether caused by an inherent defect of the thing, or by an accident of the sea, or by *force majeure*, and the expenses incurred in order to avert or repair the same.
- (2) Damage sustained and expenses incurred by the ship, as regards its hull, apparel, equipment, and stores, from the same causes, from the time when she breaks ground in the port of departure until she is moored and anchored in her port of destination.
- (3) Loss or damage sustained by the goods stowed on deck, except in the coasting trade, if the maritime laws permit this mode of loading.
- (4) The wages and keep of the crew in case of detention or embargo due to a lawful order or to *force majeure*, if the freight was agreed to be a sum fixed for the voyage.
- (5) The expenses of a port of refuge, into which the ship has put for repairs or provisions.
- (6) The loss on the goods sold by the captain at a port of refuge for the payment of provisions and the preservation of the crew, or to provide any other necessities for the ship, in which case the indemnity shall be charged to the ship.
- (7) The keep and wages of the crew during a quarantine.
- (8) Damage suffered by the ship or cargo through an accidental or inevitable collision with another vessel. If the casualty has been caused by the fault or want of care of the captain, he is responsible for the whole of the damage.
- (9) Any damage sustained by the cargo through the fault, want of care, or barratry of the captain or crew, without prejudice to the right of the owner to the corresponding indemnity against the captain, the ship, and the freight.

Art. 885. The owner of the thing which gives rise to the expense or sustains the damage shall bear simple or particular averages.

Art. 886. In general, all those losses and expenses which are deliberately caused or incurred in order to save the ship or cargo, or both together, from a known and real risk, are general or common average, and in particular the following:—

- (1) Effects or money given for the ransom of the ship or cargo seized by enemies, corsairs, or pirates, and the provisions,

wages, and expenses of the captured ship while the ransom is being arranged.

- (2) Effects jettisoned in order to lighten the ship, whether they belong to the cargo, the ship, or the crew, as also the damage caused by the jettison to the effects which remain on board.
- (3) Cables and masts broken or cut and anchors and chains slipped, in order to save the cargo or ship, or both together.
- (4) Expenses of lightening a ship, or transshipping a portion of the cargo in order to lighten the ship and enable it to reach a port or roadstead, and the damage which may thereby result to the goods lightened or transhipped.
- (5) Damage caused to cargo by an opening made in the ship for the purpose of letting out water and preventing her from sinking.
- (6) Expenses incurred to refloat a ship voluntarily stranded for the purpose of saving her.
- (7) The damage caused to the ship through its being necessary to open, make holes in, or break her up to save the cargo.
- (8) The cost of restoring to health and the keep of sailors wounded or maimed in defending or saving the ship.
- (9) The wages of any member of the crew detained as a hostage by enemies, corsairs, or pirates, as also the necessary expenses incurred by him in prison, until he has returned to the ship, or to his domicile, if he so prefers.
- (10) The wages and provisions for the crew of a ship freighted by the month, during the time of an embargo or detention resulting from *force majeure*, or from an order of the Government, or for the purpose of repairing damage caused to the ship for the common benefit.
- (11) The loss in value of goods sold at a port of refuge in order to repair general average damage to the ship.
- (12) The expenses of the liquidation of the average.

Art. 887. All who are interested in the ship and the cargo on board, at the time when an average loss occurs, must contribute to make good the amount of the general or common average.

Art. 888. For incurring expenses and causing damage constituting general average, there must be a resolution of the captain, taken after previous consultation with the pilot and other officers of the ship, and after hearing the parties interested in the cargo, if they are present.

If the said parties object, and the captain and officers, or a majority of them, or the captain, dissenting from the opinion of the majority, should deem it necessary to take certain measures, they may take such

measures on their own responsibility, without prejudice to the right of the shippers to enforce their claims against the captain before the judge or competent tribunal, if they can prove that he acted fraudulently, unskilfully, or negligently.

If the parties interested in the cargo, being on board, are not heard, they are not bound to contribute to the general average, for which, in such case, the captain is responsible, unless the urgency of the case was such that there was not the time necessary for a previous consultation.

Art. 889. The adoption of a resolution to make a sacrifice constituting general average, must necessarily be entered in the logbook, with a statement of the grounds on which it was taken, the votes to the contrary and grounds of dissent, if any, and the irresistible and urgent causes which prevailed with the captain if he acted on his own responsibility.

In the former case, the entry shall be signed by all the persons present who can do so, if possible, before proceeding with the execution, otherwise at the first favourable opportunity. In the second case, it must be signed by the captain and officers of the ship. In the entry, after setting out the resolution, all the articles thrown overboard shall be specified in detail, and mention shall be made of the damage caused to the articles which remain in the ship. The captain is obliged to deliver a copy of this entry to the judicial maritime authority of the first port into which he puts, within twenty-four hours of his arrival there, and to certify it upon oath.

Art. 890. The captain shall superintend the jettison and cause the articles to be jettisoned in the following order:—

- (1) Those which are on deck, commencing with those which hamper the navigation or are dangerous to the ship, taking first, if this be possible, the articles which are heaviest and of the least use and value.
- (2) Those which are below the upper deck, always commencing with those of the greatest weight and least value, to the quantity and number which may be absolutely necessary.

Art. 891. In order that the owners of the articles jettisoned may have the benefit of the general average and be entitled to an indemnity, it is necessary, as regards the cargo, that its existence on board be proved by means of the bill of lading; and as regards articles belonging to the ship, that the proof be given by means of the inventory drawn up before the departure, in conformity with the first paragraph of Art. 686.

Art. 892. If in lightening the ship on account of a storm, to facilitate her entering a port or roadstead, part of the cargo is transferred to launches or boats and is lost, the owner of this part shall be entitled to

an indemnity as though the loss had been caused by general average, its amount being apportioned over the whole value of the ship and the cargo from which it proceeds.

If, on the other hand, the goods transhipped are saved and the ship is lost, no contribution can be demanded from the goods saved.

Art. 893. If, as a measure necessary to restrict a fire in a port, roadstead, creek, or bay, it is decided to sink a vessel, the loss thereby occasioned shall be considered general average, to which the ships saved shall contribute.

CHAPTER II.—OF PUTTING INTO A PORT OF REFUGE.

Art. 894. If the captain, during the voyage, believes that the ship cannot continue the voyage to her port of destination through want of victuals, reasonable fear of embargo, corsairs, or pirates, or any accident of the sea which makes her unseaworthy, he shall assemble the officers and summon the parties interested in the cargo who may be present, who are entitled to be present at the consultation, without the right to vote: and if, after the circumstances of the case have been considered, the belief is considered well-founded, the decision shall be taken to put into the nearest and most convenient port, and the proper entry shall be made in the logbook and signed by all.

The captain shall have the decisive vote, and the parties interested in the cargo may make such complaints and protests as they think proper, which shall be inserted in the minute, so that use may be made of them by the protesting parties if they should so desire.

Art. 895. The expenses of putting into the port of refuge shall always be on account of the shipowner or charterer, who, however, shall not be responsible for the injuries which may result to the shippers in consequence of putting in, if this measure be justifiable.

Art. 896. Putting into the port of refuge shall not be considered justifiable in the following cases:—

- (1) If the cause of the want of victuals is that the quantity of provisions necessary for the voyage according to use and custom has not been taken on board, or if the provisions have been rendered useless or lost through bad stowage, or want of care in keeping them.
- (2) If the risk of enemies, corsairs, or pirates is not well known, manifest, and founded on positive facts capable of proof.
- (3) If the bad condition of the ship arises from the fact that she has not been properly repaired, fitted out, and equipped for the voyage, or from unskilful handling by the captain.

- (4) Whenever the average results from the fraud, negligence, imprudence, or want of skill of the captain.

In these cases the shipowner and the captain are jointly liable for the losses which the shippers may suffer in consequence of putting into the port.

Art. 897. If in order to repair the ship, or in consequence of the cargo being in danger, it is necessary to discharge the cargo, the captain must ask the authorization of the competent judge, and not proceed with the discharge until he has communicated with the interested party, or the representative of the cargo, if there be any.

In a foreign port, the right to authorize the discharge appertains to the Mexican Consul, if there be one.

In the former case, the expenses must be borne by the shipowner, and in the second, by the owners of the goods for whose benefit the operation was undertaken.

If the discharge was undertaken for both reasons, the expenses shall be divided in proportion to the values of the ship and the cargo.

Art. 898. The custody and preservation of the discharged cargo shall be at the expense of the captain, who is responsible for it, except in cases of *force majeure*.

Art. 899. If the whole or a portion of the cargo appears damaged, or there be imminent danger of its being damaged, the captain may apply to the competent judge or to the consul, as the case may be, to authorize the sale of the whole or part of the said cargo, and the competent authority shall authorize the sale after preliminary proof and declaration of experts, advertisements, and other formalities prescribed in such cases, and an entry in the logbook, in conformity with the provisions of Art. 698.

The captain shall justify the legality of his proceeding, under penalty of being liable to the shipper for the difference between the proceeds of the sale and the price which the goods would have realised, if they had arrived in good condition at their port of destination.

Art. 900. The captain shall be liable for the losses occasioned by his delay, if he does not continue the voyage when the reason for putting into the port of refuge ceases to operate. If the reason therefor was the fear of enemies, corsairs, or pirates, the departure should be preceded by a consultation, and a resolution taken at a meeting of the officers of the ship and the parties interested in the cargo who may be present, in conformity with the provisions of Art. 894.

TITLE FIFTH.

OF THE PROOF AND LIQUIDATION OF AVERAGE.

CHAPTER I.—PROVISIONS COMMON TO ALL CLASSES OF AVERAGE.

Art. 921. Those interested in the proof and liquidation of averages can always make agreements and undertake mutual obligations, with reference to the responsibility for and the liquidation and payment of the said averages.

In default of agreement the following rules shall be observed:—

- (1) The proof of the average shall be made at the port where the repairs, if any are necessary, are made, or at the port of discharge.
- (2) The adjustment shall be made at the port of discharge, if it be Mexican.
- (3) If the average has occurred beyond Mexican territorial waters, or if the cargo has been sold in a foreign port of refuge, the adjustment shall be made at the port of refuge.
- (4) If the average has occurred near the port of destination, provided that it is possible to reach the same, the steps referred to in Rules 1 and 2 shall be taken there.

Art. 922. Both in the case of the adjustment of averages being privately effected in virtue of an agreement, and in the case of the intervention of judicial authority on the demand of any of the interested parties who refuses his consent, all the interested parties shall be cited and heard if they have not renounced this right.

When they do not attend, or have no lawful representative, the adjustment shall be effected by the consul in a foreign port, and where there is no consul, by the competent judge, according to the laws of the country and on behalf of the person who ought to undertake it.

When the representative is a person known in the place where the adjustment is to be made, he shall be allowed to intervene, and his intervention shall be legally effective, even though he may only have been authorized by a letter from the shipowner, shipper, or insurer.

Art. 923. Claims in connection with averages shall not be admissible if they do not exceed five per cent. of the claimant's interest in the ship or the cargo, if the average be general, and one per cent. of the thing damaged, if the average be particular, deducting in both cases the expenses of valuation, unless there be an agreement to the contrary.

Art. 924. Damages, averages, bottomry loans and premiums, and any other losses whatsoever, shall not bear interest on account of delay, until after the expiration of three days, counting from the day on which the adjustment was finished and communicated to all the parties interested in the ship and in the cargo, conjointly or separately.

Art. 925. If, in consequence of one or more accidents of the sea, the ship or the cargo, or both together, have sustained both particular and general average on the same voyage, the expenses and losses belonging to each average shall be determined separately, in the port where the repairs are made, or where the goods are discharged, sold, or disposed of.

For this purpose the captain must require the expert valuers, and the shipwrights who execute the repairs, as also the persons who value the goods or take part in their discharge, preservation, sale, or disposal, to set out in their estimates, valuations, and accounts, separately and exactly, the losses and expenses appertaining to each average, and as regards each average, the losses and expenses falling on the ship and the cargo, stating also distinctly whether or not there are losses caused by an inherent defect of the thing and not by an accident of the sea; and if there be expenses common to several averages and to the ship and her cargo, they must calculate the amount which appertains to each and state it distinctly.

CHAPTER II.—OF THE ADJUSTMENT OF GENERAL AVERAGES.

Art. 926. If the interested parties have so agreed, the adjustment and distribution of general average shall, at the instance of the captain, be made privately.

For this purpose, within forty-eight hours from the arrival of the ship in port, the captain shall call all those interested together, so that they may decide whether the arrangement or adjustment of the general average shall be made by experts and liquidators appointed by themselves, in which case, if the interested parties are all agreed, it shall be so effected.

If the interested parties cannot agree, the captain shall apply to the competent judge, *i.e.*, to the judge of the port in which such proceedings ought to be taken, in conformity with the provisions of this Code, or the Mexican Consul, if there be one, and if there be none, to the local authority, when the proceedings have to be taken in a foreign port.

Art. 927. If the captain does not act in accordance with the provisions of the preceding article, the shipowner or the shippers can procure the adjustment to be made, without prejudice to their right to claim indemnification from him.

Art. 928. The experts appointed by the interested parties or by the judge shall, after accepting the appointment, proceed to the examination of the ship and of the repairs which she needs, and to make an estimate of the cost of the said repairs, distinguishing the losses and damage resulting from the average from those which arise from an inherent defect of the things.

The experts shall also state whether the repairs can be immediately executed, or whether it is necessary to discharge the ship in order to ascertain her condition and repair her.

As regards the goods, if the damage is externally visible, they must proceed to ascertain it before the delivery. If the damage is not apparent at the time of discharge, the examination may take place after the delivery, provided it be effected within twenty-four hours after the discharge, and without prejudice to the other proofs which the experts may deem desirable.

Art. 929. The valuation of the things which have to contribute to general average, and of those which constitute the average, shall be subject to the following rules:—

- (1) The goods saved, which have to contribute to the general average, shall be valued at the market price at the port of discharge, deducting the freight, customs duties, and expenses of unloading, according to the result of the actual inspection of the said goods; the bills of lading, in the absence of an agreement to the contrary, are not to be taken into account.
- (2) If the adjustment has to be made in the port of departure, the value of the goods laden on board shall be taken to be the purchase price, plus the expenses of loading, excluding the insurance premium.
- (3) If the goods are damaged, they shall be valued at their actual value.
- (4) If the voyage has been broken up, and the goods having been sold in a foreign country, the average cannot thus be adjusted, the contributing value shall be taken to be the value of the goods at the port of arrival, or the net proceeds of their sale.
- (5) The lost goods which constitute the general average shall be estimated at the value which goods of the same category have at the port of discharge, provided that their nature and quality are specified in the bills of lading, and if not, according to the value shown in the invoices of purchase made out in the port of loading, plus the expenses incurred subsequently and the freight.

- (6) Masts cut away, sails, cables, and other tackle cut or abandoned for the purpose of saving the ship, shall be valued at their market price, deducting one-third for the difference between new and old.

This deduction shall not be made in respect of anchors and chains.

- (7) The ship shall be valued according to her actual value in the state in which she is.
- (8) The freight shall contribute on half of its amount.

Art. 930. Goods loaded on the upper deck shall, if saved, contribute to general average, but if jettisoned for the common safety, shall not give a right to indemnification, except when, on coasting voyages, the maritime laws allow them to be stowed in this manner.

The same rule shall apply to goods on board which are not included in the bills of lading or cargo-lists, as the case may be.

In every case, the shipowner and the captain shall be liable to the shippers for the losses resulting from the jettison, if the goods were stowed on deck without their consent.

Art. 931. The ship's provisions and munitions of war shall not contribute to general average, nor shall the articles of personal use and clothes of the captain, officers, and crew.

The articles of personal use and clothes of the shippers, supercargoes, and passengers, which are on board at the time of the jettison shall also be exempt.

The effects jettisoned do not contribute to the payment of general average losses sustained on a different and subsequent occasion by the goods saved.

Art. 932. When the experts have finished the valuation of the effects saved, and of those lost which constitute the general average, the repairs of the ship (if necessary) having been effected, and the accounts for the repairs having, in this case, been approved by the interested parties or by the judge, all the documents shall be handed to the appointed adjuster in order that he may proceed to the apportionment of the average.

Art. 933. In order to effect the adjustment, the adjuster shall examine the captain's protest, checking it, if necessary, by the log-book, and all the contracts which may have been made between the parties interested in the average, the estimates and examinations of the experts, and the accounts of the repairs effected. If this investigation shows that there is any defect in the procedure which may prejudice the rights of the interested parties or affect the responsibility of the captain, he shall call attention thereto in order that the defect

may be corrected, if possible, and if not, he shall mention the defect in the preliminary recital of the adjustment.

Then he shall proceed to the distribution of the amount of the average, for which purpose he shall determine:—

- (1) The contributing capital, which shall be determined by the value of the cargo, in accordance with the rules set out in Art. 929.
- (2) The value of the ship in the state in which she is, in accordance with the declaration of the experts.
- (3) The half (50 per cent.) of the amount of the freight, deducting the other half for the wages and keep of the crew.

When the amount of the general average has been determined, in accordance with the provisions of this Code, it shall be apportioned rateably among the contributing values.

Art. 934. The insurers of the ship, freight, and cargo shall be obliged to pay the amount of general average, as soon as it is demanded from each of these interests respectively.

Art. 935. If, notwithstanding the jettison of the goods, or cutting away of masts, ropes, and tackle, the ship perishes in the same casualty, there shall be no contribution in general average.

The owners of the effects saved shall not be liable to indemnify the owners of those jettisoned, lost, or deteriorated.

Art. 936. If the ship, after having been saved from the danger which gave rise to the jettison, is lost through another accident during the voyage, the existing effects saved from the first danger shall continue liable to contribution to the general average, according to their value in their actual condition, deducting the expenses incurred for their salvage.

Art. 937. If the ship and cargo have been saved by the cutting away of the masts, or by any other damage intentionally caused to the ship for that purpose, and the goods afterwards perish, or are stolen, the captain cannot require the shippers or consignees to contribute to the repair of the damage, unless the loss has been caused by the act of the owner or consignee himself.

Art. 938. If the owner of the jettisoned goods recovers them after having been compensated in general average, he must reimburse to the captain and the other parties interested in the cargo the sum which he has received, less the amount of the damage caused by the jettison, and the salvage expenses.

In this case, the amount reimbursed shall be divided between the

ship and the parties interested in the cargo, in the proportion of their contributions to the payment of the average.

Art. 939. If the owner of the effects thrown overboard recovers them without having claimed indemnification, he shall not be obliged to contribute to the payment of general average sustained by the rest of the cargo after the jettison.

Art. 940. The apportionment of the general average shall not have executory effect until it has been unanimously approved by the interested parties, or, failing such approval, has been approved by the judge, after examining the adjustment and hearing the interested parties who are present, or their representatives.

Art. 941. When the adjustment has been approved, it shall be the duty of the captain to carry out the apportionment, and he shall be responsible to the owners of the things which have sustained the average for the losses which his delay or negligence may cause to them.

Art. 942. If the contributories fail to pay the amount of their contributions within three days after demand made upon them, proceedings shall be taken at the instance of the captain, for the sale of the effects saved, until a sufficient sum has been realised to effect the payment.

Art. 943. If the interested party, on receiving the effects saved, does not give sufficient security for the payment of his share of the general average, the captain can defer the delivery of the said effects until the payment of the average.

TITLE THIRD.

OF SPECIAL CONTRACTS OF MARITIME COMMERCE.

CHAPTER I.—ON THE CONTRACT OF AFFREIGHTMENT.

Art. 732. If during the voyage the ship becomes innavigable, the captain is obliged to engage another at his own cost, in good condition, to receive the cargo and transport it to its destination. For this purpose he is bound to seek for a vessel not only in the port of refuge, but also in the adjacent ports within a distance of 150 kilometres.

If the captain, through indolence or fraud, does not procure a ship to transport the cargo to its destination, the shippers, after having previously required the captain to hire another ship within a fixed period, may themselves make the contract of affreightment, applying to the judicial authority to sanction, by a summary judgment, the contract which they have made. The same authority shall compel the

captain, on his own account and responsibility, to carry into effect the contract of affreightment made by the shippers.

If the captain, in spite of his endeavours, cannot find another ship for the freight, he shall deposit the cargo at the disposal of the shippers, and shall give them an account of what has occurred as soon as possible, in which case the freight shall be determined by the distance covered by the ship, without any compensation being due.

Art. 733. Freight is payable according to the stipulations contained in the contract, and if there be none expressed, or they are uncertain, the following rules shall be observed:—

- (1) If the ship is freighted by the month or day, the freight shall commence to run from the day on which the ship is placed in the service.
- (2) If the affreightment is made for a fixed time, the freight shall commence to run from the same day.
- (3) If the freight is payable by weight, payment shall be made by gross weight, including the packing, such as the casks or other things which contain the cargo.

Art. 734. Freight is due for goods sold by the captain in order to effect indispensable repairs to the hull, machinery, or apparel, or for indispensable and urgent necessities.

The value of these goods shall be fixed according to the result of the voyage, viz.:—

- (1) If the ship arrives safely at the port of destination, the captain shall account for the price which goods of the same kind realise in the said port.
- (2) If the ship is lost, the captain shall account for the said goods at the price for which he sold them.

The same rule shall be observed for the payment of the freight, which shall be paid in full if the ship arrives at her destination, and in proportion to the distance covered, if she should be lost.

Art. 735. Freight is not payable for goods jettisoned for the safety of the ship, but its amount shall be considered general average, reckoning same in proportion to the distance covered when the said goods were jettisoned.

Art. 736. Nor is freight payable for goods lost by shipwreck, or stranding, or captured by pirates or enemies.

If the freight has been received in advance, it shall be returned, unless there be an agreement to the contrary.

Art. 737. If the ship or goods are ransomed, or the effects saved from the shipwreck, the freight shall be paid according to the distance covered by the ship in carrying the cargo; and if, after being repaired,

the ship transports the cargo to the port of destination, the freight shall be paid in full, without prejudice to the proportion due in respect of the average.

Art. 738. Merchandise which has suffered deterioration or diminution through inherent defects, or the bad quality and condition of the packing, or accident, shall pay the whole freight agreed upon in the contract of affreightment.

Art. 739. The natural increase in weight or size of goods laden on the ship shall be for the benefit of the shipowner, and earn freight as fixed in the contract of carriage.

Art. 740. The cargo shall be specially liable for the payment of the freight and the expenses incurred for it, which the shippers must reimburse, as well as for its share of general average; but it shall not be lawful for the captain to defer the discharge for fear that this obligation will not be fulfilled.

If an adequate reason for mistrust should exist, the judge or tribunal may, on the application of the captain, order the deposit of the goods until he has been completely indemnified.

Art. 741. The captain may apply for the sale of the cargo in the proportion necessary to assure the payment of the freight, expenses and averages which are due to him, reserving the right to claim the balance of what may be due to him on these accounts, if the proceeds of the sale are not sufficient to cover his claim.

Art. 742. The goods carried are preferentially charged with the freight and expenses during twenty days, counting from the day of their delivery or deposit. During this period, the sale of the said goods may be petitioned for, even although there be other creditors, and the shipper or consignee has been declared bankrupt.

This right, nevertheless, cannot be exercised upon goods which, after delivery, have passed into the possession of a third party, without fraud on his part and for valuable consideration.

Art. 743. If the consignee can not be found, or if he refuses to receive the cargo, the judge or tribunal must, on the application of the captain, order it to be deposited, and authorize the sale of what may be necessary for the payment of the freight and other expenses for which the cargo is liable.

The sale shall also take place when the goods deposited are liable to deterioration, or when, by reason of their condition or other circumstances, the expenses of preservation and custody will be out of proportion to their value.

CHAPTER III.—ON THE OBLIGATIONS OF THE CHARTERER.

Art. 758. In case of putting into a port of refuge for repairs to the hull, machinery, or apparel, the shippers must wait until the ship is repaired; but may, however, unload at their own cost, if they deem it convenient.

If, in the interest of cargo exposed to deterioration, the shippers, or the tribunal, or the consul, or the competent authority in a foreign country, should order the discharge of the goods, the expenses of unloading and reloading shall be borne by the shippers.

Art. 759. If the shipper, without the happening of any of the cases of *force majeure* mentioned in the preceding article, wishes to have his goods unloaded before arrival at the port of destination, he shall pay the freight in full, as well as the expenses of the delay due to his demand, and the losses which may be caused to the other shippers.

Art. 760. In shipments of general cargo, any of the shippers may unload the goods before commencing the voyage, paying the half of the freight, the cost of the stowage and restowage, and any other losses which may thereby be caused to the other shippers.

Art. 761. The discharge being effected and the cargo being placed at the disposal of the consignee, the latter must immediately pay to the captain the freight earned and the other expenses for which said cargo may be responsible.

The *primage* shall be paid in the same proportion and at the same time as the freight, all the alterations and modifications to which the payment of freight is subject having effect in regard to it.

Art. 762. The charterers and shippers cannot abandon goods damaged by inherent defects or accident, for the payment of the freight and the other expenses. The abandonment may, nevertheless, be made if, when the cargo consists of liquids, they have leaked, and not more than one-fourth of the contents remains in the vessels.

APPENDIX P.

THE LAW OF NORWAY.

As the editors have already stated in the Appendix on the Law of Denmark, the Scandinavian Maritime Code, of which Mr. Lowndes published a draft in the previous edition of this work, has been adopted by all three Scandinavian States. The Norwegian Maritime Law of the 20th July, 1893, in which it is embodied, came into force on the 1st July, 1894. In substance and in arrangement, the Danish and Norwegian Laws are the same as the Swedish Law, an annotated English translation of which is set out in Appendix U, *infra*; and it is therefore unnecessary to insert here the text of the Norwegian Law. The editors are indebted to Mr. Th. Ameln, Average Adjuster, of Bergen, for the particulars of the following Norwegian decisions of the Norwegian Supreme Court relating to § 188 (No. 7) and § 190 (No. 7) of the Code, given on the 30th September, 1903:—

Owing to a leak, the vessel was obliged to put into a port of refuge. The captain insisted on having the port of refuge expenses apportioned as general average, and only delivered the cargo against the undertaking of the receiver "to share the expenses of the average according to the Maritime Law, after a lawfully-settled average statement." The Supreme Court would not hold that by this undertaking he had waived any defence given to him by the Law. They held that the leak, which was the cause of putting in, was due to the unseaworthiness of the vessel at the commencement of the voyage, but did not decide whether this circumstance relieved the cargo-owner from the liability to contribute to general average, as he had agreed that the contribution was due, provided that the defect was of such nature that it could not have been discovered at the time of departure by the exercise of due care. (See Code, § 142 *in fine*.) The Court, however, held that the onus of proving that the defect was of such nature was on the vessel, and as such proof was not given, the receiver of the cargo was absolved.

Mr. Ameln has also informed the editors that the judgment of the Danish Court, of the 24th January, 1898 (set out *ante*, Appendix H, p. 495), agrees with the Norwegian practice. If, however, there had been a full negligence clause in the bill of lading, the shipowners would not have been liable. The Danish judgment of the 20th January, 1908 (*ante*, p. 495), he says, also agrees with the Norwegian practice.

As in Denmark, average adjusters are appointed by the Government, after having passed an examination before a permanent examining committee.

APPENDIX Q.



THE LAW OF PERU.

The Peruvian Law relating to general average is contained in Arts. 819—838, 859—881, of the Commercial Code, which came into force on the 1st July, 1902. Its provisions on this subject are identical with those of Arts. 881—900, 921—943, of the Mexican Code of 1889, which are printed in Appendix O, *ante*, and it is therefore unnecessary to set them out here.

APPENDIX R.

THE LAW OF PORTUGAL.

EXTRACTS FROM THE PORTUGUESE COMMERCIAL CODE WHICH
WAS PROMULGATED ON THE 28TH JUNE, 1888, AND CAME INTO
FORCE ON THE 1ST JANUARY, 1889.

L. III.

DO COMMERCIO MARITIMO.

TIT. V.

DAS AVARIAS.

Art. 634°. São reputadas avarias todas as despesas extraordinarias feitas com o navio ou com a sua carga conjunta ou separadamente, e todos os damnos que acontecem ao navio e carga desde que começam os riscos de mar até que acabam.

§ 1°. Não são reputadas avarias, mas simples despesas a cargo do navio, as que ordinariamente se fazem com a sua saída e entrada, assim como com o pagamento de direitos e outras taxas de navegação, e com as tendentes a aligeirá-lo para passar os baixos ou bancos de areia conhecidos á saída do logar da partida.

L. III.

OF MARITIME COMMERCE.

TIT. V.

OF AVERAGE.

Art. 634. All extraordinary expenses incurred for the ship or her cargo, jointly or separately, and also all damage sustained by the ship and cargo, from the commencement of the sea-risks until their termination, are considered average.

§ 1. The following are considered not to be average, but ordinary expenses to be defrayed by the ship, viz., the usual expenses of leaving and entering port, as well as the payment of dues and other taxes of navigation, and the expenses of lightening the ship in order to pass over known shoals or sandbanks in leaving the place of departure.

§ 2°. As avarias regulam-se por convenção das partes e, na sua falta ou insufficiencia, pelas disposições d'este codigo.

Art. 635°. As avarias são de duas especies: avarias grossas ou communs, e avarias simples ou particulares.

§ 1°. São avarias grossas ou communs todas as despesas extraordinarias e os sacrificios feitos voluntariamente com o fim de evitar um perigo pelo capitão ou por sua ordem, para a segurança commum do navio e da carga desde o seu carregamento e partida até o seu retorno e descarga.

§ 2°. São avarias simples ou particulares as despesas causadas e o damno soffrido só pelo navio ou pelas fazendas.

Art. 636°. As avarias communs são repartidas proporcionalmente entre a carga e a metade do valor do navio e do frete.

Art. 637°. As avarias simples são supportadas e pagas ou só pelo navio ou só pela cousa que soffreu o damno ou occasionou a despesa.

Art. 638°. O exame e a estimação da avaria na carga, sendo o damno visivel por fora, serão feitos antes da entrega: em caso contrario, o exame poderá fazer-se depois, contanto que se verifique no prazo de quarenta e oito horas

§ 2. Averages are regulated by the agreement of the parties, or in default of an agreement, or if the agreement be inapplicable, by the provisions of this Code.

Art. 635. Averages are of two kinds—general or common average, and simple or particular average.

§ 1. All extraordinary expenses incurred and sacrifices made voluntarily by the captain or in pursuance of his orders, with the object of avoiding a danger, for the common safety of ship and cargo, from loading and departure to return and discharge, are general or common average.

§ 2. Expenses incurred for, and damage suffered by, the ship or cargo alone are simple or particular average.

Art. 636. General average is apportioned rateably between the cargo and half the value of the ship and freight.

Art. 637. Particular average is borne and paid either solely by the ship, or solely by the thing which has suffered the damage or caused the expense.

Art. 638. The examination and assessment of average to the cargo shall be made before delivery, if the damage is visible externally; in the contrary case, the examination may be made afterwards, provided it takes place within

da entrega, isto sem prejuizo de outra prova.

§ unico. Na estimacão a que se refere este artigo determinar-se-ha qual teria sido o valor da carga, se tivesse chegado sem avaria, e qual é o seu valor actual, tudo isto independentemente da estimacão do lucro esperado, sem que em caso algum possa ser ordenada a venda de carga para se lhe fixar o valor, salvo a requerimento do respectivo dono.

Art. 639°. Haverá repartição de avaria grossa por contribuição sempre que o navio e a carga forem salvos no todo ou em parte.

§ 1°. O capital contribuinte compõe-se:

1°. Do valor liquido integral que as cousas sacrificadas teriam ao tempo no logar da descarga;

2°. Do valor liquido integral que tiverem no mesmo logar e tempo as cousas salvas e tambem da importancia do prejuizo que soffreram para a salvacão commum;

3°. Do frete a vencer, deduzidas as despesas que teriam deixado de se fazer se o navio e a carga se perdessem na occasião em que se deu a avaria.

§ 2°. Os objectos do uso e o fato, as soldadas dos marinheiros, as bagagens dos passageiros e as

forty-eight hours of delivery, without prejudice to other proof.

The assessment to which the present Article relates is for the purpose of determining what the value of the cargo would have been if it had arrived undamaged, and its actual value, independently of any estimate of expected profits, there being in no case a right to order a sale of the cargo to determine its value, except at the request of the owner.

Art. 639. There must be an apportionment in general average every time the ship and cargo are saved, in whole or in part.

§ 1. The contributing capital comprises:

1. The clear integral value which the things sacrificed would have had at this time at the place of discharge.

2. The clear integral value at the same time and place of the things saved, together with the amount of the loss which they have suffered for the common safety.

3. The freight being earned, deducting the expenses which would not have been incurred if the ship and cargo had perished on the occasion when the average occurred.

§ 2. Articles for personal use and clothing, the wages of the crew, passengers' baggage, and

municiões de guerra e de boca na quantidade necessaria para a viagem, posto que pagas por contribuição, não fazem parte do capital contribuinte.

Art. 640°. A carga de que não houver conhecimento ou declaração do capitão ou que não se achar na lista ou no manifesto não se paga, se for alijada, mas contribue na avaria grossa salvando-se.

Art. 641°. Os objectos carregados sobre o convés contribuem na avaria grossa salvando-se.

§ unico. Sendo alijados ou danificados pelo alijamento não são contemplados na contribuição e só dão lugar á acção de indemnização contra o capitão, navio e frete se foram carregados na cobertura sem consentimento do dono; mas tendo-o havido haverá logar a uma contribuição especial entre o navio, o frete e os outros objectos carregados nas mesmas circunstancias, sem prejuizo da contribuição geral para as avarias comuns de todo o carregamento.

munitions of war and provisions within the quantity necessary for the voyage, do not contribute, although they are made good by contribution.

Art. 640. Goods for which there is no bill of lading or declaration by the captain, or which do not appear on the cargo-list or manifest, are not contributed for when they are jettisoned, but contribute to general average when they are saved.

Art. 641. Goods laden on deck contribute to general average when they are saved.

If they are jettisoned or damaged by a jettison, they cannot be the subject of contribution; there can only be an action for an indemnity against the captain, the ship and the freight, if they have been laden on deck without the consent of their owner. If, however, he has given his consent, there must be a special contribution as between the ship, the freight and the other articles carried in the same manner, without prejudice to the general contribution of the whole cargo to general average (a).

(a) Art. 497 is as follows:—

The captain is responsible to the shippers of goods shipped in accordance with the bills of lading, for damage sustained by goods which he has carried on deck without the written consent of the shipper, but not for valuables, money and securities not declared in the bills of lading.

A simple declaration in the bill of lading that the goods will be carried on deck implies the consent of the shipper, unless he protests immediately.

Art. 642°. Se, não obstante o alijamento ou o corte de apparelhos, o navio se não salva, não ha logar a contribuição alguma e os objectos salvos não respondem por pagamento algum em contribuição de avaria dos objectos alijados, avariados ou cortados.

§ 1°. Se pelo alojamento ou corte de apparelhos o navio se salva e, continuando a viagem, perece, os objectos salvos contribuem só por si no alijamento no pé do seu valor no estado em que se acham, deduzidas as despesas de salvação.

§ 2°. Os objectos alijados não contribuem em caso algum para o pagamento dos damnos soffridos depois do alijamento pelos objectos salvos.

§ 3°. A carga não contribue para o pagamento do navio perdido ou declarado innavegavel.

Art. 643°. As disposições acêrea de avarias grossas e de avarias simples são igualmente applicaveis ás barcas e aos objectos carregados nellas que forem empregados em alliviar o navio.

§ 1°. Perdendo-se a bordo das barcas fazendas descarregadas para alliviar o navio, a repartição da sua perda será feita entre o navio e o seu inteiro carregamento.

Art. 642. If notwithstanding the jettison, or cutting away of the apparel, the ship has not been saved, there can be no contribution, and the articles saved are not liable to make any payment or contribution in average for the articles jettisoned, damaged, or cut away.

§ 1. If, in consequence of the jettison or cutting away of the apparel, the ship has been saved, but, continuing her voyage, she is lost, only the articles which are saved contribute among themselves to the jettison on their value in their existing condition less the salvage expenses.

§ 2. The jettisoned articles do not in any case contribute to the payment of damage sustained after the jettison by the goods saved.

§ 3. The cargo does not contribute for a ship which has been lost or declared innavigable.

Art. 643. The provisions relating to general and particular average are equally applicable to the lighters employed to lighten the ship and to the goods laden on them.

§ 1. If goods, discharged to lighten the ship, are lost when on board the lighters, the loss is apportioned over the ship and the whole of her cargo.

§ 2º. Se o navio se perde com o resto do carregamento, as fazendas descarregadas nas barcas, ainda que cheguem ao seu destino, não contribuem.

Art. 644º. Não contribuem nas perdas acontecidas a navio, para cuja carga eram destinadas, as fazendas que estiverem em terra.

Art. 645º. Se acontecer, durante o trajecto, quer ás barcas, quer ás fazendas nellas carregadas, damno reputado avaria grossa, este damno será supportado, um terço pelas barcas e dois terços pelas fazendas carregadas a seu bordo.

Art. 646º. Se depois de feita a repartição os objectos aliçados foram recobrados pelos donos, estes reporão ao capitão e aos interessados a contribuição recebida, deduzidos o damno causado pelo alijamento e as despesas da recuperação, repartindo-se proporcionalmente entre os interessados que contribuam a reposição recebida.

§ unico. Se o dono dos objectos aliçados os recuperar sem reclamar indemnização alguma, estes objectos não contribuirão nas avarias sobrevindas ao restante da carga depois do alijamento.

Art. 647º. O navio contribue pelo seu valor no logar da descarga, ou pelo preço da sua venda, deduzida a importancia das avarias

§ 2. If the ship is lost with the rest of her cargo, the goods placed in the lighters are not liable for any contribution, although they reach their destination in safety.

Art. 644. Goods on land do not contribute to losses sustained by a ship on which it was intended to load them.

Art. 645. If during the transit general average damage is sustained either by the lighters or the goods laden on them, one-third of the damage is borne by the lighters and two-thirds by the goods on board of them.

Art. 646. If, after the apportionment, the jettisoned articles have been recovered by their owners, the owners must return to the captain and the parties interested the contribution which they had received, less the damage caused by the jettison and the expenses of recovery. The amount refunded is to be divided proportionately between the parties by whose contributions it had been provided.

§. If the owner of the jettisoned articles recovers them without having claimed an indemnity, they do not contribute to average losses sustained by the rest of the cargo after the jettison.

Art. 647. The ship contributes on her value at the place of discharge, or on the price for which she was sold, less the amount of

particulares, ainda que sejam posteriores á avaria commun.

Art. 648°. As fazendas e os mais objectos que devem contribuir, assim como os objectos alijados ou sacrificados, serão estimados segundo o seu valor, deduzidos o frete, direitos de entrada e outros de descarga, tendo-se em consideração os conhecimentos, as facturas e, na sua falta, outros quaesquer meios de prova.

§ 1°. Estando designados nos conhecimentos a qualidade e valor das fazendas, se valerem mais, contribuirão pelo seu valor real, sendo salvas, e serão pagas por esse valor, mas em caso de alijamento ou avaria regulará o valor dado no conhecimento.

§ 2°. Valendo as fazendas menos, contribuirão segundo o valor indicado, se forem salvas, mas attender-se-ha ao valor real, se forem alijadas ou estiverem avariadas.

Art. 649°. As fazendas carregadas serão estimadas segundo seu valor, no lugar da descarga, deduzidos o frete, os direitos de entrada e outros de descarga.

§ 1°. Se a repartição houver de fazer-se em lugar do reino de onde o navio partiu ou tivesse de partir, o valor dos objectos carregados será determinado segundo o preço

her particular average losses, even though sustained later than the general average.

Art. 648. The goods and other articles that have to contribute, as well as the articles jettisoned or sacrificed, shall be assessed at their value, less the freight, import duties and other expenses of the discharge, as proved by bills of lading, invoices, or in their absence by any other means of proof.

§ 1. If the quality and value of the goods are stated in the bills of lading, and they are worth more, they shall contribute on their real value, if they are intact, and they shall be contributed for on such value; but if they have been jettisoned or damaged the adjustment shall be made on the value stated in the bill of lading.

§ 2. If the goods are worth less, they shall contribute on the declared value, if they are intact; but if they have been jettisoned or damaged the adjustment must be made on their real value.

Art. 649. The goods laden on board shall be assessed at their value at the place of discharge, less the freight, import duties and other expenses of the discharge.

§ 1. If the adjustment is made in a port in the kingdom from which the ship sailed or was intended to sail, the goods shall be estimated at the cost price, to-

da compra, acrescidas as despesas até bordo, não comprehendido o premio do seguro.

§ 2º. Se os objectos estiverem avariados, serão estimados pelo seu valor real.

§ 3º. Se a viagem se rompeu ou as fazendas se venderam fora do reino e a avaria não pôde lá regular-se, tomar-se-ha por capital contribuinte o valor das fazendas no logar do rompimento, ou o producto liquido que se tiver obtido no logar da venda.

Art. 650º. As avarias grossas ou communs serão reguladas e repartidas segundo a lei do logar onde a carga for entregue.

Art. 651º. Todas as avarias grossas successivas repartem-se simultaneamente no fim da viagem, como se formassem uma só e mesma avaria.

§ unico. Não se applica a regra d'este artigo ás fazendas embarcadas ou desembarcadas em um porto de escala, mas tão somente a respeito d'estas fazendas.

Art. 652º. A regulação e repartição das avarias grossas fazem-se a diligencia do capitão e, deixando elle de a promover, a diligencia dos proprietarios do navio ou da carga, sem prejuizo da responsabilidade d'aquelle.

gether with the expenses incurred until they were put on board, not including the insurance premium.

§ 2. Articles which are damaged shall be assessed at their real value.

§ 3. If the voyage has been broken up, or if the goods have been sold out of the kingdom at a place where the average cannot be adjusted, the contributory value shall be the value of the goods at the place where the voyage was broken up, or the net proceeds realized at the place of sale.

Art. 650. General or common average must be adjusted and distributed according to the law of the place where the cargo is delivered.

Art. 651. All successive general averages are adjusted simultaneously at the end of the voyage, as if they only constituted one and the same average.

§. This rule does not apply to goods taken on board or discharged at a port of call; but the exception is confined to these goods.

Art. 652. The adjustment and distribution of general average are made at the instance of the captain, and if he neglects to take steps for this purpose, at the instance of the owners of the ship or cargo, without prejudice to the captain's responsibility.

§ unico. O capitão apresentará junto com o seu relatório e devido protesto todos os livros de bordo e mais documentos concernentes ao sinistro, ao navio e á carga.

Art. 653°. Não haverá logar a acção por avarias conte o afretador e o recebedor da carga, se o capitão recebeu o frete e entregou as fazendas, sem protesto, ainda que o pagamento do frete fosse antecipado.

TIT. I. CAP. III.

DO CAPITAO.

Art. 508, § 8. Sacrificar de preferencia, em caso de alijamento, os objectos de menos valor, os menos necessarios ao navio, os mais pesados e os que pejam a coberta.

TIT. IV.

DO CONTRATO DE RISCO.

Art. 631. O dador contribue para as avarias communs em beneficio do tomador, sendo nulla qualquer convenção em contrario.

TIT. VI.

DAS ARRIBAS FORÇADAS.

Art. 654°. São justas causas de arribada forçada:

1°. A falta de viveres, aguada ou combustivel;

§. The captain must hand over, with his report and protest, the ship's books and all the other papers relating to the casualty, the ship and the cargo.

Art. 653. An action will not lie against the freighter and the receiver of the cargo for average losses, if the captain has received the freight and delivered the goods without protest, even though the freight has been paid in advance.

From TIT. I. CAP. III.

OF THE CAPTAIN.

Art. 508, § 8. If it be necessary to lighten the ship, the captain must select for sacrifice the articles of least value, those which are least necessary for the ship, the heaviest and those which encumber the deck.

From TIT. IV.

OF BOTTOMRY.

Art. 631. The lender contributes to general average in relief of the borrower; any agreement to the contrary is void.

From TIT. VI.

OF PUTTING INTO A PORT OF REFUGE.

Art. 654. Justifiable grounds for putting into a port of refuge are:

1. Want of victuals, water or fuel;

2º. O temor fundado de inimigos;

3º. Qualquer accidente que inhabilite o navio de continuar a navegação.

Art. 655º. Em qualquer dos casos previstos no artigo precedente, ouvidos os principaes da tripulação e lançada e assinada a resolução no diario de navegação, o capitão poderá proceder á arribada.

§ 1º. Os interessados na carga que estiverem a bordo podem protestar contra a deliberação tomada de proceder á arribada.

§ 2º. Dentro de quarenta e oito horas depois da entrada no porto da arribada deve o capitão fazer o seu relatorio perante a autoridade competente.

Art. 656º. São por conta do armador ou fretador as despesas ocasionadas pela arribada forçada.

Art. 657º. Considera-se legitima a arribada que não proceder de dolo, negligencia ou culpa do dono, do capitão ou tripulação.

Art. 658º. Considera-se illegitima a arribada:

1º. Se a falta de viveres, aguada ou combustivel proceder de se não ter feito o necessario fornecimento,

2. Reasonable fear of enemies;

3. Any accident which has disabled the ship from continuing the navigation.

Art. 655. In any of the cases specified in the preceding Article, having heard the principal members of the crew, and entered and signed the resolution in the log-book, the captain may proceed to put into a port of refuge.

The parties interested in the cargo who happen to be on board may protest against the decision to put into a port of refuge.

Within forty-eight hours after entering the port of refuge, the captain must make his report to the competent authority.

Art. 656. The expenses caused by putting into a port of refuge are on account of the shipowner or charterer.

Art. 657. Putting into a port of refuge is considered legitimate, when not caused by the fraud, negligence or fault of the owner, captain or crew.

Art. 658. Putting into a port of refuge is considered not to be legitimate:

1. When the want of victuals, water or fuel is due to the fact that a sufficient supply was not

ou de se haver perdido por má arrumação ou descuido;

2º. Se o temor do inimigo não for justificado por factos positivos;

3º. Provindo o accidente que inhabilitou o navio de continuar a navegação da falta de bom concerto, aperecebimento, esquipação e má arrumação ou resultando de disposição desacertada ou de falta de cautela de capitão.

Art. 659º. Sendo a arribada legitima, nem o dono nem o capitão respondem pelos prejuizos que da mesma possam resultar aos carregadores ou proprietarios da carga.

§ unico. Sendo illegitima, o capitão e o dono serão conjuntamente responsaveis até a concorrência do valor do navio e frete.

Art. 660º. Só pode autorizar-se descarga no porto da arribada sendo indispensavel para concerto do navio ou reparo de avaria na carga, devendo nestes casos preceder no reino e seus dominios autorização do juiz competente, e no estrangeiro autorização do agente consular, havendo-o, e, na sua falta, da autoridade local.

provided, or that they have been lost through bad stowage or negligence;

2. If the fear of enemies is not justified by positive facts;

3. If the accident which has made the ship unfit to continue the voyage is due to inadequacy of repairs, fitting-out or equipment, or to bad stowage, or, when it results from a wrong course of action or a want of prudence on the part of the captain.

Art. 659. If putting into the port of refuge was legitimate, neither the owner nor the captain is responsible for any losses that the shippers or owners of the cargo may sustain.

§. If it was not legitimate, the captain and the owner are jointly responsible, to the value of the ship and freight.

Art. 660. The discharge of cargo at a port of refuge can only be authorised when it is indispensable for the repair of the ship, or on account of damage to the cargo. In these cases there should first be obtained, in the kingdom and its possessions, an authorization by a competent judge, and abroad an authorization by the consular agent, if there be one, and if not by the local authority.

TIT. I. CAP. VI.

DO FRETAMENTO.

Art. 547°. Se a saída do navio para o porto do seu destino é embarçada por motivo de força maior, guerra, bloqueio ou interdição de commercio, ha logar á rescisão do fretamento.

§ unico. Nos casos previstos neste artigo não tem o fretador direito a indemnização, e são por conta do afretador as despesas da descarga.

Art. 548°. Se o impedimento occorrer durante a viagem, ha direito ao frete pelo caminho andado.

§ unico. Sendo temporario o impedimento, pode o afretador descarregar as fazendas, fazendo-o á sua custa, e com e condição de as tornar a carregar ou de indemnizar o capitão, prestando num e noutro caso caução, quando exigida.

Art. 549°. Estando bloqueado o porto do destino do navio, ou dando-se algum caso de força maior que embarace a entrada do navio nesse porto, o capitão apportará a outro porto, ou retrocederá áquelle de onde saiu, conforme entender que é mais proveitoso ao afretador.

§ 1°. No caso de voltar o navio ao porto de onde saiu vencerá o

From TIT I. CAP. VI.

OF AFFREIGHTMENT.

Art. 547. If the departure of the ship for its port of destination is delayed by *force majeure*, war, blockade or interdiction of commerce, the contract of affreightment may be rescinded.

§. In the cases provided for in the present Article the person letting the ship is not entitled to an indemnity, and the expenses of the discharge are payable by the charterer.

Art. 548. If the impediment occurs in the course of the voyage, freight is due for the distance run.

§. In the case of a temporary impediment, the charterer may have the goods unloaded, but at his own expense, and on condition that he will reload them or indemnify the captain. In either case he must give security, if required to do so.

Art. 549. If the port of destination is blockaded, or if a case of *force majeure* prevents him from entering it, the captain must go to another port to discharge his cargo, or return to the port from which he sailed, as he thinks most advantageous for the charterer.

§ 1. If the ship returns to the port of departure, the full freight

frete da ida e mais um terço pelo regresso.

§ 2°. Se o navio aportar a outro porto, vencerá, além do frete da ida, também um terço por aquelle excesso de caminho.

§ 3°. O capitão poderá também fazer expedir noutro navio as fazendas ao seu destino, sendo neste caso o frete a cargo dos afretadores.

§ 4°. O disposto neste artigo e seus paragraphos entender-se-ha na falta de ordens recebidas, ou sendo estas inexequíveis.

Art. 555°. O frete das fazendas sacrificadas para salvação do navio e carga será pago integralmente na conta de avaria grossa.

§ 1°. Também se pagará por inteiro o frete das fazendas que perecerem na viagem por vício proprio, ou que forem vendidas em seu unico beneficio, salva a deducção das despesas que por motivo d'esse evento o capitão ficar dispensado de effectuar.

§ 2°. Será igualmente pago por inteiro o frete das fazendas applicadas para as necessidades do navio, se este chegou a bom porto, salva a obrigação de pagar o navio aos donos das fazendas o valor que ellas teriam no porto da descarga.

is due for the outward voyage, plus one-third for the homeward voyage.

§ 2. If the ship proceeds to another port, in addition to the outward freight one-third is also due for this supplementary voyage.

§ 3. The captain may also forward the goods to their destination by another vessel, the freight in this case being payable by the charterers.

§ 4. The provisions of this Article and its provisos apply when orders have not been received or when they cannot be executed.

Art. 555. The freight of goods sacrificed for the safety of the ship and cargo must be paid in full as part of the general average.

§ 1. So also, the freight of goods which perish during the voyage through inherent vice, or are sold solely for their own benefit, is paid in full, deducting the expenses which, in consequence, the captain will not have to incur.

§ 2. The same rule applies to the freight of goods used for the purposes of the ship, if she reaches port in safety, without prejudice to the obligation of the ship to pay to the owners of these goods the value which they would have had at the port of discharge.

Art. 556°. Se o capitão é obrigado, por motivo de caso fortuito ou de força maior, a concertar o navio durante a viagem, e o afretador, por não querer esperar pela conclusão do concerto, fizer descarregar as fazendas, pagará o frete por inteiro, prestando, porém, caução pela quota de avaria grossa a que as fazendas possam estar obrigadas.

Art. 557°. Não é devido frete se o afretador provar que o navio era innavegavel na occasião de emprender a viagem para que fôra afretado.

Art. 558°. Não é devido frete, pelo tempo que durarem os concertos do navio, se este foi afretado ao mês ou por periodo determinado, nem aumento de frete, se o fretamento foi por viagem.

§ unico. Tambem não é devido frete, ou aumento de frete, se o navio é demorado por bloqueio do porto ou por outro caso de força maior.

Art. 561°. Não pode o capitão para segurança do frete, avarias e despesas reter as fazendas a bordo, sendo-lhe unicamente licito durante a descarga pedir o deposito das que forem sufficientes para aquelle pagamento.

Art. 562°. Não se poderá pedir a redução do frete, nem abandonar ao frete as fazendas por motivo de demora na chegada,

Art. 556. If the captain is obliged by accident or *force majeure* to repair the ship in the course of the voyage and the freighter, not being willing to wait until the repairs are finished, has the goods discharged, he must pay the full freight and give security for the contribution in general average for which the goods will eventually become liable.

Art. 557. No freight is due if the charterer proves that the ship was unseaworthy when she began the voyage for which she was chartered.

Art. 558. No freight is due for the time occupied by the repairs of the ship, if she was chartered by the month or for a fixed time, nor any increase of freight, if the contract of affreightment was for a voyage.

§. Similarly no freight or increase of freight is due, if the ship is delayed by a blockade of the port or by other circumstances of *force majeure*.

Art. 561. The captain cannot retain the goods on board as security for his freight, average or his disbursements; he can only require the deposit of a sufficient portion to secure this payment.

Art. 562. No reduction can be demanded from the freight, nor can the goods be abandoned for the freight, on account of delay

diminuição de valor ou deterioração.

§ unico. No caso das vasilhas que contiverem líquidos se esvaziarem por mais de metade, podem abandonar-se ao frete essas vasilhas e o seu conteúdo.

in arrival, diminution of value or deterioration.

§. In case vessels containing liquids have leaked to the extent of half their contents, they may be abandoned with their contents for the freight.

The editors have been informed by Señor Don A. J. Gomes Netto, Junior, Average-Adjuster, of Lisbon, that average adjustments are rarely made on the basis of the Portuguese Law, except in a few cases of vessels trading between Portuguese ports. As a rule, the parties agree to have a friendly adjustment made, based on the York-Antwerp Rules, 1890. Consequently there has been scarcely any litigation in the Portuguese Courts on questions of general average. Under the Portuguese practice, says Señor Netto, the ship and the freight at risk contribute to general average on the half of their net values, as fixed by the York-Antwerp Rules, 1890, but the whole amount made good for sacrifices of ship and freight is added to these half values; and this practice has been confirmed by a judgment of the Tribunal of Commerce.

APPENDIX S.



THE LAW OF RUSSIA.

In Russia the ancient laws compiled into a code by Catherine II. were revised entirely under the auspices of the Czar Nicholas I., and the present Code, the *Zvod Zakonoff*, was promulgated in 1835.

The regulations contained in this Code naturally enough are by no means adequate to the present state of things as to maritime law, and as it was rumoured that important changes were about to be introduced, Mr. Lowndes applied to Mr. Heimbürger, the Official Adjuster at St. Petersburg, for information as to this point. In a letter dated June 29th, 1887, the latter said that there had been no steps taken to alter the law touching average. Mr. Heimbürger thought "no change in the law regulating general average will be contemplated before the reform of the entire legislation regulating commercial questions is determined upon." He added, "The Russian law and customs regulating general average remain exactly as represented in your work, 3rd edition."

Ulrich's translation which Mr. Lowndes adopted is from the edition of 1881.

Mr. Heimbürger further informed Mr. Lowndes that owing to the defective state of the law, and there being also in the last article on average the following clause,—“In case of any circumstances taking place which are not provided for by these regulations, the average-stater is to adjust them according to the laws *and customs* of adjacent states,”—it had been for many years the rule acted on by the adjusters of St. Petersburg and Riga that the customs of Hamburg should be taken as the standard for adjustments. These customs are now obsolete in Hamburg itself, that city having adopted the German Code.

From adjustments of recent date, drawn up by the same eminent adjuster, I find (said Mr. Lowndes) that, when a ship is obliged to put into a port of refuge to repair damage, whether the result of accident or sacrifice, all the port charges, pilotages, and other necessary expense, as well of entering as of quitting the port, together with the

cost of discharging the cargo and reloading it, the warehouse rent of the cargo, and any damage it may necessarily sustain in the process of discharging or loading, are admitted into general average. So likewise are the wages and provisions of the crew; not, however, as in Holland and the United States, from the time of bearing up, but only during the actual suspension of the voyage—that is to say, from the time of entering the port of refuge until she sails again.

The contribution is made upon the entire value of the ship, in her damaged condition; on one-half of the entire freight; and on the value of the cargo.

[The editors have submitted this Appendix to Mr. Geo. Jackson, Official Adjuster, St. Petersburg, who wrote on the 11th February, 1910, as follows:—

“I have carefully looked over the Appendix relating to the Law of Russia. . . . In the meantime, no changes have taken place either in the Russian Law or in the practice generally, although there is, unfortunately, a growing tendency for each group of Russian ports to introduce its own general average rules or customs, especially when new questions arise.

“Within the last fifteen years several drafts of a new law of general average have been prepared, but matters never seem to get beyond this.”

Mr. Jackson added that the corrections which he found necessary to make in the text were chiefly the result of faulty translation from the Russian.]

Extracts from the Code.

§ 1074. Those are called general averages to the vessel or merchandise, which are incurred for the safety of the vessel, of the crew, and the cargo; such as ransom from the enemy, damage incurred during defence or combat, shipwreck or disaster, cutting away anchor, cable, masts, or rigging; the throwing overboard of merchandise, or of the cargo or any other object, with the intention of lightening the ship (a).

(a) “At this point we may discuss those cases of general average which are not expressly regulated in the mercantile Code.

“(a) *Voluntary stranding*.—If a ship has been purposely run ashore to save ship and cargo from a common danger, then, provided she is brought off again, any damages caused by the stranding, including the bringing off, as well as the costs of bringing off, are compensated on the principles of general average. If the ship had been drifting ashore already, and the captain merely selects the most advantageous spot for running ashore, this no longer entitles to general average. (Gourlie, p. 141.) Anchors, chains, or sails which are damaged in the attempts to get off are made good in general average; also the fuel and engine-material consumed for that purpose. There is an uncertainty whether the wages and maintenance of the crew during the detention at

§ 1075. The losses caused by these general averages are borne by all who have an interest in the ship or cargo. The division of this loss is effected by contribution.

§ 1076. The injury that the ship or cargo sustains by the effects of bad weather is ranked as particular average. (Art. 1071.) But if it should occur that, through the violence of the tempest, a mast is broken (*b*), and must be cut down to save ship and cargo, and that the lower portion of it remains in good condition in the vessel, the injury is looked upon as a general average.

§ 1077. If, to escape danger, or to save ship and cargo from wreck or foundering, an anchor, cable, or mast, or any other rigging must be cut away, the captain, if it be practicable, shall give the first stroke of the hatchet, and in default, the pilot, the mate, or two or three of the crew. If it becomes necessary to throw overboard part of the cargo, it is the duty of the supercargo, if one is on board, to perform this duty first. In case he refuses, and the captain finds the jettison absolutely necessary, he may order some of the men to throw cargo overboard. In such cases, as far as circumstances will permit, goods of the lowest value should be thrown overboard first, in order to spare the more valuable.

§ 1078. If there be found on a merchant vessel artillery, ammunition, provender, or any other object for the service of war, on land or at

the place of stranding belong to general average or not. It is decided in the affirmative by Gourlie, p. 729.

“(b) *Press of sail*.—Damages hereby caused to the ship, her appurtenances, or to the cargo are not usually paid by general average, even if the press of sail has been put on to avoid capture or stranding.

“(c) *Port of refuge expenses*.—If a ship has to put in because she cannot continue her voyage owing to serious disaster, it is general average, without distinction whether the damage to the ship itself belonged to general or particular average. In such a case general average includes—costs of going in and going out; harbour dues; wages and maintenance of the crew from the moment when the ship runs in until the ship is again ready to sail. If the cargo cannot remain on board while the repairs are effected, then to general average belong:—the costs of discharge and re-loading; the costs ashore of taking care of it; the loss necessarily consequent on discharging and re-loading; but not any damage caused during the warehousing by fire or water. Adjusters generally include in general average the costs of fire insurance and of preserving the cargo. Sometimes in South Russia the costs during the voyage to the port of refuge are distributed in general average.” (Ulrich, p. 252.)

(b) “The wording of this rule is obscure. If a mast is broken by a storm and gets lost, this, according to Art. 1071, is particular average. But if the mast is broken by a storm, and from the beating of its fragments against the ship's side, a new common danger to ship and cargo sets in, so that it is necessary to get rid of the *débris* by cutting away, then the value of these is to be made good in general average, if the stump of the mast that remains seems sound. This is evidently the meaning of Art. 1076 (conf. Art. 1091).” (Ulrich, p. 253.)

sea, belonging to the Crown; at the last extremity these may be thrown overboard, if by such means the remainder can be saved.

§ 1079. If, to escape danger, to save the vessel or cargo, or to lighten the ship, a portion of the goods must be thrown overboard, and the opening of the hatches occasions damage to the rest of the cargo, this injury is looked upon as general average, and must be supported by contribution. (Art. 1075.)

§§ 1080 and 1081. It is the same at the time of defence against the enemy or pirates, as respects the damage done to the vessel, or the wounds or death of the crew, as to the indemnity due in this case.

§§ 1082 and 1083. It is also the same—1st, when the vessel is ransomed from the enemy or pirates; but if he who ransoms her is a prisoner, the captain is obliged to pay without delay the price of the ransom; 2nd, when, in the case of necessity for entering a port, a lighter (*c*) or some other vessel must be hired.

§ 1084. If, after transferring the merchandise into a lighter, or other boat, in order to escape danger, to save or to lighten the ship, such boat or lighter is lost or damaged, and the vessel enters the port without cargo, the damage is general. But if it be the vessel which is lost or damaged, and not the lighter or merchandise, the loss does not bear the same character. For the ship is lost, but the cargo remains for him to whom it belongs (*d*).

§ 1085. If the vessel or merchandise have become damaged through carelessness or imprudence of the captain or his crew at the time of loading or unloading, or at the time of stowing in the hold; if the hatches have not been closed, or the water emptied at seasonable times; the losses which result shall be accounted for by the captain and crew, who shall repair them, each in proportion to the amount of his pay.

§ 1086. If the captain takes merchandise on board without the charterer's knowledge or consent, and such merchandise is partly or entirely thrown overboard or damaged, the charterer ought not to contribute to the general average on these goods.

§ 1087. If the captain has overcharged his vessel beyond the load-water-line, and if, in case of danger, to save or lighten the vessel, he

(*c*) "If the lighterage occurs in the regular course of the voyage, it is not general average (Art. 1069)." (Ulrich, p. 255.)

(*d*) "On the other hand, there is a community of interest between the goods laden in lighters, and these boats, so that, if during their community a sacrifice for the common safety takes place, both lighters and cargo and the lighter-hire must contribute to make good the sacrifice." (Ulrich, p. 255.)

throws overboard a portion or the whole of the merchandise, the goods thus thrown overboard are not considered as averages, but the captain and shipowner should pay the entire loss.

§ 1088. If cargo properly stowed in the ship's hold has to be thrown overboard to lighten the ship, this is considered general average. But if goods put into the cabin or in the crew's places or between decks, or on deck, or about anywhere, are jettisoned, they do not count as general average, but in this case, each party bears his own loss (*e*). But if the captain keeps money, metals, or other valuable articles in his cabin for better preservation, or any other motive, and if to lighten the vessel he throws other things away in their stead, these objects must contribute to the general average the same as the rest.

§ 1089. If any one takes on board with him any goods, valuable or otherwise, without declaring them to the captain, without having taken a receipt for them, or paid their carriage, he alone bears the loss, in case of loss at sea or jettison.

§ 1090. If the captain who has experienced bad weather at sea has reason to fear that the goods have been damaged, he ought, before opening the hatches, within four-and-twenty hours after his arrival, to notify before a notary public and inform the custom house authorities. Then within seven days of his arrival he must extend his protest before the notary, and make a declaration on oath before two sworn witnesses. The same must be done by the mate, the carpenter, and two or more of the crew, who must affirm that the damage has not arisen from their negligence or carelessness. (Conf. Art. 203.)

§ 1091. The same formalities are to be observed when, in consequence of a storm, a mast has been cut away, and the merchandise thrown entirely or partially into the sea.

§ 1092. The merchandise should not be delivered to the consignees before the general averages are regulated. It remains for that purpose under the care of the Customs until they are regulated.

§ 1093. The contributory values are established by valuing the vessel and cargo, including goods jettisoned, at the prices they would have

(*e*) "Deck cargo jettisoned is not made good by general average, whether the jettison took place in a long voyage, or a coasting trip. If water casks on the deck are thrown over for the common good, their value is compensated in general average, deducting a third for the difference between new and old." (Ulrich, p. 257.)

fetched at the place of discharge, deducting customs, freight, discharge-costs, and carriage to the Custom House (*f*). But if any one declares a value less than the actual one, it is not forbidden to another party to demand that which has been declared at that price, adding three per cent. to its declared value, upon which it shall be delivered to him on payment of duties, freight, discharge-costs, and carriage to the Custom House.

§ 1094. If the captain and the crew have faithfully defended the vessel, their rewards are counted as general average. Thus, he who is not wounded receives six months' pay; the wounded man a twelve-month's pay; he who has lost a limb, two years'; and two years' pay to the heirs of the seaman who dies from his wounds. The costs of healing the wounded are also treated as general average.

§ 1095. If, during the voyage, the ship has suffered too severely to be enabled to continue the voyage to her final destination, and the captain should be compelled, in order to repair her, to enter another port,

(*f*) "With regard to *compensation for things sacrificed* we must observe, that the full amount of the costs of repairs to the ship is made good, if at the time of the damage she had not been a full year at sea. The same holds good of compensation for individual parts of the ship, whilst individual portions of the ship's furniture are only fully compensated as far as they have been sacrificed on their first voyage. In other cases, a third for difference between new and old must be deducted from the full amount, but for anchor chains one sixth, and for anchors themselves nothing.

"Compensation for *goods sacrificed* is to be reckoned at the market price which goods of like kind and quality would fetch at the place of destination, or where the voyage ends. A deduction of freight, customs, and costs, only takes place when these sums have been saved by the loss of the goods. If the cargo was already damaged before it was jettisoned, only that value which it had in its damaged state is to be made good.

"For *goods sold* to cover general average expenses on the way the owners of cargo receive the market price at the place of destination, and pay full freight to the shipowner.

"Art. 1061. If on the way, in order to repair his vessel or to purchase necessary victuals, the captain has to get money, either by pledging cargo, or selling or bartering some of it, he must pay the owners thereof, or whom it may concern, the same price they would have fetched at the place they were undertaken to be conveyed to. But the owner of the goods must pay to the captain the full freight agreed, just as if the goods had reached their proper destination.

"Compensation for *freight* lost must usually be regulated by the amount agreed in the bill of lading for the carriage of the jettisoned goods.

"Concerning *contributory* values the adjusters at St. Petersburg and Riga are accustomed to be ruled by the German Code. Still, sometimes in Russia adjustments are drawn up in which the freight contributes only on the half of its gross amount." (Ulrich, p. 259.)

and if the repairs cannot be completed in sufficient time to enable him to arrive at the period agreed upon, and such delay occasions damage to the owner of the merchandise or cargo, the captain is authorized to hire another vessel at a reasonable rate. In this case two-thirds of the amount of freight are paid by the captain, and the other third is borne by the owner of the cargo. The captain who shall have conveyed the merchandise to its destination receives one-half of the primage, and the other half remains to the captain who transferred the merchandise to him.

APPENDIX T.

THE LAW OF SPAIN.

The Law of Spain on the subject of general average is contained in the *Código de Comercio* of 1885, which came into force on the 1st January, 1886.

It might, said Mr. Lowndes, have been hoped that a legalization of practices conforming to the York-Antwerp rules would here have been found, and that some verbose and now obsolete regulations would have been quietly dropped. But this is not the case: Spain is content for the present neither to lead nor to follow. The editors have, however, been informed by Señor Francisco Beck, average adjuster, of Barcelona, that in the case of vessels coming from abroad, it is usual to make the adjustment in accordance with the York-Antwerp rules. Even when these rules are not incorporated in the charterparty or bills of lading, the average bond generally stipulates that they shall be followed.

TIT. IV. SECT. I.

DE LAS AVERIAS.

§ 811. Serán averías gruesas ó comunes par regla general todos los daños y gastos que se causen deliberadamente para salvar el buque, su cargamento ó ambas cosas á la vez, de un riesgo conocido y efectivo, y en particular las siguientes:

1^a. Los efectos ó metálico invertidos en el rescate del buque ó del cargamento apresado por enemigos, corsarios ó piratas, y los alimentos, salarios y gasto del buque detenido mientras se hiciere el arreglo ó rescate.

TIT. IV. SECT. I.

OF AVERAGE.

§ 811. Gross or general average consists as a general rule of all losses and expenses which are purposely incurred to save ship, her cargo, or both together, from an expected and real danger; and, in particular, of the following:

1. Property or money used for the ransom of ship or cargo captured by enemies, corsairs, or pirates; and maintenance, wages, and ship's expenses during the settlement of the ransom.

2^a. Los efectos arrojados al mar para aligerar el buque, ya pertenezcan al cargamento, ya al buque ó á la tripulacion, y el daño que por tal acto resulte á los efectos que se conserven á bordo.

3^a. Los cables y palos que se corten ó inutilicen, las anclas y las cadenas que se abandonen para salvar el cargamento, el buque ó ambas cosas.

4^a. Los gastos de alijo ó trasbordo de una parte del cargamento para aligerar el buque y ponerlo en estado de tomar puerto ó rada, y el perjuicio que de ellos resulte á los efectos alijados ó trasbordados.

5^a. El daño causado á los efectos del cargamento por la abertura hecha en el buque para desaguarlo é impedir que zozobre.

6^a. Los gastos hechos para poner á flote un buque encallado de propósito con objeto de salvarlo.

7^a. El daño causado en el buque que fuere necesario abrir, agujerear ó romper para salvar el cargamento.

2. Property thrown overboard to lighten a ship, whether belonging to cargo, ship, or crew, and any damage resulting from this operation to the property which remains on board.

3. Cables and masts cut away or made useless, anchors and chains abandoned, in order to save cargo, ship, or both (*a*).

4. The cost of lighterage or transshipment of part of the cargo to lighten the ship and enable her to enter a port or roadstead, and any damage resulting therefrom to the goods discharged or transhipped.

5. Damage caused to the cargo by making an opening in the ship to get rid of the water and prevent her foundering.

6. The expense of floating a ship which has been stranded purposely to save her (*b*).

7. Damage done to a ship from being necessarily opened, pierced, or broken, to save the cargo.

(*a*) "Damage to ship and her belongings by press of sail is usually compensated as general average when the press of sail has been put on to escape from wreck or capture." (Ulrich, p. 157.)

(*b*) "If the ship has been purposely run ashore in order to avert danger of wreck, or of capture of ship and cargo, then the damages incurred both by the stranding and the getting off are counted as general average. (Gomez de la Suna y Reus y Garcia, p. 345, Obs. 3; and J. H. Gourlie, Jr. p. 142.)"—(Ul. p. 157.)

8a. Los gastos de curacion y alimento de los tripulantes que hubieron sido heridos ó estropeados defendiendo ó salvando el buque.

9a. Los salarios de cualquier individuo de la tripulacion detenido en rehenes por enemigos, corsarios ó piratas, y los gastos necesarios que cause en su prision hasta restituirse al buque ó á su domicilio si lo prefriere.

10a. El salario y alimentos de la tripulacion del buque fletado por meses, durante el tiempo que estuviere embargado ó detenido por fuerza mayor ú orden del Gobierno, ó para reparar los daños causados en beneficio comun.

11a. El menoscabo que resultare en el valor de los generos vendidos en arribada forzosa para reparar el buque por causa de avería gruesa.

12a. Los gastos de la liquidacion de la avería.

8. The cost of cure and maintenance of members of the crew wounded or maimed in defence of the ship (*c*).

9. The wages of any of the crew detained as hostage by enemies, corsairs, or pirates, and the expenses necessarily incurred through his detention, until he is restored to the ship, or to his home if he wishes.

10. The wages and maintenance of the crew of a ship freighted by the month while she is under embargo, or detained by *vis major* or order of State, or to repair damage caused for the common benefit (*d*).

11. The loss caused by selling goods at a port of refuge, to raise funds to repair the ship's damage caused by a general average disaster (*e*).

12. The expense of adjusting the average.

(*c*) "Even the damage caused to the ship by the defence belongs to general average." (Ul. p. 157.)

(*d*) "Wages and maintenance of the crew will not be compensated in general average (even if the putting in was in consequence of a general average sacrifice) if the charter-party was signed for the voyage. The compensation for these costs, according to the principle of general average, never takes place if the ship has put in in consequence of a particular damage, whether chartered for the voyage or by the month." (Ul. p. 158.)

(*e*) "The loss on goods sold during the voyage belongs sometimes to general, sometimes to particular average (Art. 809.6), according as the proceeds were expended to cover a general or a particular average damage. In case of general average, the shipper can claim, not the net proceeds in a port of refuge—which may be higher or lower than the value in the port of destination—but the value of goods sold at the port of destination. Since, according to Art. 659, full freight is to be paid to the shipowner, then the freight of the value aforesaid ought not to be curtailed to the shipper." (Ul. p. 158.)

§ 812. A satisfacer el importe de las averías gruesas ó comunes contribuirán todos los interesados en el buque y cargamento existente en él al tiempo de ocurrir la avería.

§ 809. Serán averías simples ó particulares, por regla general, todos los gastos y perjuicios causados en el buque ó en su cargamento que no hayan redundado en beneficio y utilidad comun de todos los interesados en el buque y su carga, y especialmente los siguientes:

1ª. Los daños que sobrevinieren al cargamento desde su embarque hasta su descarga, así por vicio propio de la cosa como por accidente de mar ó por fuerza mayor, y los gastos hechos para evitarlos y repararlos.

2ª. Los daños y gastos que sobrevinieren al buque en su casco, aparejos, armas y pertrechos por las mismas causas y motivos, desde que se hizo á la mar en el puerto de salida hasta que ancló y fondeó en el de su destino.

3ª. Los daños sufridos per las mercaderías cargadas sobre cubierta, excepto en la navegacion de cabotaje, si las ordenanzas maritimas lo permiten.

4ª. Los sueldos y alimentos de la tripulacion cuando el buque fuere detenido ó embargado por orden legitima ó fuerza mayor, si el fletamento estuviere contratado por un tanto el viaje.

§ 812. All parties interested in the ship and the cargo on board of her at the time of the average disaster must contribute to make up the amount of general average.

§ 809. Simple or particular average consists generally, of all expenses and damage caused to ship or cargo, which have not been intended for the common benefit or use of all the parties interested in ship and cargo; and especially of the following:

1. Any damage happening to the cargo, from its loading to its discharge, either resulting from *vice propre*, or accident of the sea, or *vis major*, and any expenses incurred to avoid or repair such damage.

2. Any damage or expense occurring to the ship, her hull, apparel, equipment, and stores, from the same causes, from the time of going to sea at the port of departure till casting anchor at that of destination.

3. Damage done to any goods laden on deck, excepting in the coasting trade, if the maritime regulations allow it.

4. Wages and maintenance of crew, if the ship is detained or under embargo by order of State or *vis major*, if she is freighted at so much for the voyage (*f*).

(f) "Board and wages of the crew during their detention in a harbour of refuge

5^a. Los gastos necesarios de arribada á un puerto para repararse ó aprovisionarse.

5. The necessary expenses of putting into a port of refuge to be repaired or to victual (g).

6^a. El menor valor de los generos vendidos por el capitan en arribada forzosa, para pago de alimentos y salvar á la tripulacion, ó para cubrir cualquiera otra necesi-

6. The loss resulting from selling goods at a port of refuge, in order to pay for provisions and provide for the safety of the crew, or to cover any other neces-

belong—if the charter-party is drawn up for the voyage—not to general average either, if the ship has met on the way so severe a particular damage that she had to put into a port of refuge and get repaired there, since otherwise by continuing her voyage without repairing the damage, ship and cargo would have been threatened with a common danger.

“If the ship has been chartered by time, then the wages and board of the crew during the continuance of the embargo or detention by higher power must be counted as general average. (Conf. Art. 811.10.)”—(Ul. p. 154.)

(g) “This rule does not distinguish between the cases, whether the damage to the hull or to parts of the ship or rigging has resulted from bad weather, or in consequence of a voluntary sacrifice made by the captain with the view of saving ship and cargo from a common danger. The costs of running into a port of refuge must always be regarded as particular average, if the putting in has taken place with the object of repairing the ship or replacing rigging. Even so Art. 821 orders that the costs of a forced putting in (*arribada forzosa*) always go to shipowners or the party who lets out the ship on hire. One may be justified in assuming that the intention of the legislature was never to allow the costs of running into a port of refuge in general average. Nevertheless, Spanish adjusters frequently divide these costs in the general average statements among ship, freight, and cargo, if the ship has put into the port of refuge in order to avoid a danger threatening both ship and cargo in common should the voyage have been continued; and they appeal to corresponding decisions in Court, only indeed in the lower Courts. This method of procedure can scarcely be approved by the higher Courts, because it is contrary to the codified law. This contrariety of practice among the adjusters is not justified by the definition of general average given in Spanish Law, for in this an actually present (*efectivo*) danger is contemplated, and not one that is threatening in case of the voyage being continued.

“The Code, 811.10, also only allows the wages and maintenance of the crew of a vessel chartered by the month, as general average, if the repairs must be effected of damages *purposely* caused in the common interests of all parties concerned. (Conf. the work of J. H. Gourlie, Jun., Philadelphia, 1881, pp. 271—274, and the commentary on the Spanish Mercantile Code by Senors Pedro Gomez de la Serna and J. Rens y Garcia, Madrid, 1875, p. 373, Ob. 5.)”—(Ul. p. 154.)

“I cannot say,” observed Mr. Lowndes, “that I agree with Herr Ulrich’s reasoning or anticipation here. Spain is always much influenced by France, and under precisely similar conditions, where the *Code de Commerce* had laid down a rule for putting into port which, like that of Spain, was in terms contrary to the principle of general average as laid down in the same Code, the Cour de Cassation found a method of breaking through the letter to the spirit, similar to that adopted in the lower Courts of Spain, and to a great extent acted on in practice.”

dad del buque, á cuyo cargo vendrá el abono correspondiente.

7^a. Los alimentos y salario de la tripulacion mientras estuviere el buque en cuarentena.

8^a. El daño inferido al buque ó cargamento por el choque ó abordaje con otro, siendo fortuito é inevitable.

Si el accidente ocurriere por culpa ó descuido del capitan, éste responderá de todo el daño causado.

9^a. Cualquier daño que resultare al cargamento por faltas, descuido ó baraterias del capitan ó de la tripulacion, sin perjuicio del derecho del propietario á la indemnizacion correspondiente contra el capitan, el buque y el flete.

sities of the ship, in which case the loss resulting from the sale shall be borne by the ship (*h*).

7. Maintenance and wages of the crew whilst the ship is in quarantine (*i*).

8. Damage to ship or cargo by striking or collision with another, if accidental and unavoidable.

If the accident arises from fault or carelessness of the captain, he will be responsible for all resulting damage.

9. Any damage happening to the cargo from the fault, carelessness, or barratry of captain or crew, without prejudice to the owner's right to claim corresponding compensation from captain, ship, and freight.

(*h*) "If goods have to be sold on the way to meet the needs of the ship, the parties concerned in the cargo have a claim to compensation for the amount which goods of the same kind and quality as those sold would fetch at the port of destination. If that port of destination be not reached, the place where the voyage terminates must stand in its place. For such goods sold on the way full freight is to be paid to the shipowner. (Art. 659.) If the ship should be lost in the further course of the voyage, then those interested in the cargo can only claim the return of the proceeds of the sale. (Commentary of G. de la Serna and J. Reus y Garcia, p. 292, Obs. 3, and p. 343, Obs. 2.) But what claim has the shipper of cargo if, when the ship has reached her destination, the net proceeds of the sale at the port of refuge have exceeded that of the port of destination? Can he then demand the net proceeds, or only the value at the place of destination? This question is not decided in the Spanish Mercantile Code. According to German law the shippers might claim the highest proceeds. (Gn. G. A. C., Art. 613, clause 2.)"—(Ul. p. 155.)

(*i*) "Only an extraordinary unexpected quarantine is here spoken of, not such a one as could have been foreseen at the signing of the charter-party. Costs of the latter kind fall under Art. 807, and must be met out of freight." (Ul. p. 155.)

§ 810. El dueño de la cosa que dió lugar al gasto ó recibió el daño soportará las averias simples ó particulares.

§ 813. Para hacer los gastos y causar los daños correspondientes á la averia gruesa, precederá resolución del capitán, tomada previa deliberación con el piloto y demás oficiales de la nave y audiencia de los interesados en la carga que se hallaren presentes.

Si éstos se opusieren, y el capitán y oficiales, ó su mayoría, ó el capitán, separándose de la mayoría, estimaran necesarias ciertas medidas, podrán ejecutarse bajo su responsabilidad, sin perjuicio del derecho de los cargadores á ejercitar el suyo contra el capitán ante el juez ó tribunal competente si pudieren probar que procedió con malicia, impericia ó descuido.

Si los interesados en la carga, estando en el buque, no fueron oídos, no contribuirán á la averia gruesa, imputable en esta parte al capitán, á no ser que la urgencia del caso fuere tal que faltase el tiempo necesario para la previa deliberación.

§ 814. El acuerdo adoptado para causar los daños que constituyen averia común habrá de extenderse necesariamente en el libro de navegación, expresando los motivos y razones en que se apoyó, los votos en contrario y el fundamento de la

§ 810. The owner of the thing that has caused the expense or sustained the damage must bear particular average.

§ 813. Before incurring the expenses, or causing the damage connected with the general average, the captain's decision must be made after consultation with the mate and other officers of the ship, in the presence of any parties interested in the cargo who may happen to be on board.

If these should not agree to the measures, and the captain and officers, or the majority, or the captain, apart from the majority, should deem them necessary, they may be carried out on his responsibility, without prejudice to the right of the shippers to claim against the captain before the judge or proper court, if they can prove that he has acted with malice, unskillfulness, or carelessness.

If parties interested in the cargo, being on board at the time, were not consulted, they need not contribute to the general average, which thus must fall on the captain, unless the urgency of the case was such that there was no time for deliberation beforehand.

§ 814. Any agreement come to about causing the damages which constitute general average must be detailed in the log-book, with the reasons and motives leading to it, the dissentient votes, and the grounds of disagreement, if any.

disidencia si existiere, y las causas irresistibles y urgentes á que obedició el capitán si obró por sí.

En el primer caso, el acta se firmará por todos los presentes que supieren hacerlo, á ser posible, antes de proceder á la ejecución: y cuando no lo sea, en la primera oportunidad. En el segundo, por el capitán y los oficiales del buque.

En el acta, y despues del acuerdo, se expresarán circunstanciamente todos los objetos arrojados, y se hará mención en los desperfectos que se causen á los que se conserven en el buque. El capitán tendrá obligación de entregar una copia de esta acta á la autoridad judicial marítima del primo puerto donde arribe, dentro de las venticuatro horas de su llegada, y de ratificarla luego con juramento.

§ 815. El capitán dirigirá la echazón y mandará arrojar los efectos por el órden siguiente:

1°. Los que se hallaren sobre cubierta, empezando por los que embaracen la maniobra ó perjudiquen al buque, prefiriendo si es posible los más pesados y de menos utilidad y valor.

2°. Los que estuvieren bajo la cubierta superior, comenzando siempre por los de más peso y menos valor, hasta la cantidad y número que fuese absolutamente indispensable.

§ 816. Para que puedan imputarse en la avería gruesa y tengan

and the irresistible and urgent reasons which the captain yielded to, in case he acted alone.

In the former case, the minute must be signed by all present who can do so, and this if possible before proceeding to execution: but, if not, at the first opportunity. In the second, by the captain and the ship's officers.

In this minute, after the agreement, mention must be made in detail of all the goods thrown overboard, and any harm done by them to those left on board. The captain must give a copy of this minute to the judicial maritime authority of the first port that the ship touches at, within four-and-twenty hours of its arrival, and confirm it upon oath.

§ 815. The captain should superintend the jettison and have the goods thrown over in the following order:

1. Those on deck, beginning with those which obstruct the handling of the vessel or injure the ship, preferring if possible the heaviest and least valuable or serviceable.

2. Those below the upper deck, beginning always with those of most weight and least value, up to the quantity and number which may be absolutely required.

§ 816. In order that effects jettisoned may be admitted into

derecho á indemnizacion los dueños de los efectos arrojados al mar, será preciso que en cuanto á la carga se acredite su existencia á bordo con el conocimiento; y respecto á los pertenecientes al buque con el inventario formado antes de la salida, conforme al párrafo primero del art. 612.

§ 817. Si alijerando el buque por causa de tempestad para facilitar su entrada en el puerto ó rada, se trasbordase á lanchas ó barcas alguna parte del cargamento y se perdiere, el dueño de esta parte tendrá el derecho á la indemnizacion como originada la pérdida de averia gruesa, distribuyéndose su importe entre la totalidad del buque y el cargamento de que proceda.

Si por el contrario, las mercaderias trasbordadas se salvaren y el buque pereciere, ninguna responsabilidad podrá exigirse al salvamento.

§ 818. Si como medida necesaria para cortar un incendio en puerto, rada, ensenada ó bahia, se acordase echar á pique algun buque, esta pérdida será considerada averia gruesa, á que contribuirán los buques salvados.

SECT. II.

DE LAS ARRIBADAS FORZOSAS.

§ 819. Si el capitan, durante la navegacion, creyere que el buque no puede continuar el viaje al

general average and their owners given a claim to compensation, the amount of cargo supposed to be on board must be certified by bill of lading, and as to the ship's appurtenances, by the inventory made out before her departure according to the first paragraph of § 612.

§ 817. If in lightening the ship on account of bad weather to facilitate her entry into a port or roadstead, some part of the cargo is put on boats or lighters and is lost, the owner of this portion has a right to compensation in general average; the amount to be divided over the whole ship and the cargo it came from.

If, on the other hand, the goods transhipped are saved and the ship itself lost, no responsibility falls on the goods saved.

§ 818. If as a necessary measure to cut off a fire which has broken out in a port, roadstead, gulf, or bay, it is agreed to scuttle a vessel, this loss is to be considered as general average to which the vessels saved must contribute.

SECT. II.

OF PUTTING INTO A PORT OF REFUGE.

§ 819. If in the course of the voyage the captain finds he cannot continue it to the port of destina-

puerto de su destino por falta de viveres, temor fundado de embargo, corsarios ó piratas, ó por cualquier accidente de mar que lo inhabilite para navegar, reunirá á los oficiales, citará á los interesados en la carga que se hallaren presentes y que pueden asistir á junta sin derecho á votar; y si examinadas las circunstancias del caso se considerase fundado el motivo, se acordará la arribada al puerto más proximo y conveniente, levantando y extendiendo en el libro de navegacion la oportuna acta, que firmarán todos.

El capitan tendrá voto de calidad, y los interesados en la carga podrán hacer las reclamaciones y protestas que estimen oportunas, las cuales se insertarán en el acta para que las utilicen como vieren convenirles.

§ 820. La arribada no se reputará legítima en los casos siguientes:—

1º. Si la falta de viveres procediere de no haberse hecho el avituallamiento necesario para el viaje segun uso y costumbre, ó si se hubieren inutilizado ó perdido por mala colocacion ó descuido en su custodia.

2º. Si el riesgo de enemigos, corsarios ó piratas no hubiere sido bien conocido, manifesto y fundado en hechos positivos y justificables.

3º. Si el desperfecto del buque proviniere de no haberlo reparado,

tion for want of victuals, or well-grounded apprehension of embargo, corsairs, or pirates, or from any accident of the sea which unfits the ship for sailing on, he must call together his officers and summon any parties interested in the cargo who may be on board, who may assist at the meeting but not vote; and if on examination of the circumstances the reason should be found valid, the putting into the nearest and most convenient port shall be agreed upon and a minute of the same, signed by all, must be entered in the log-book.

The captain gives the casting vote, and parties interested in the cargo may enter their protests and demands as they see fit, to be inserted in the minute, to be made use of as may be convenient.

§ 820. Putting in is not considered legitimate in the following cases:—

1. If the want of victuals proceeds from there not having been a proper supply for the voyage, according to use and custom, or if it has been wasted or lost by bad packing or carelessness in keeping.

2. If the risk of enemies, corsairs, or pirates has not been a well-ascertained one, manifest and founded on positive and justificatory acts.

3. If the deficiencies of the ship proceed from her not being pro-

pertrechado, equipado y dispuesto convenientemente para el viaje, ó de alguna disposicion desafortunada del capitan.

4°. Siempre que hubiere en el hecho causa de la averia, malicia, negligencia, imprevision, ó impericia del capitan.

§ 821. Los gastos de la arribada forzosa serán siempre de cuenta del naviero ó fletante; pero éstos no serán responsables de los perjuicios que puedan seguirse á los cargadores por consecuencia de la arribada, siempre que ésta hubiere sido legitima.

En caso contrario serán responsables mancomunadamente el naviero y el capitan.

§ 822. Si para hacer reparaciones en el buque, ó porque hubiere peligro de que la carga sufriera averia, fuese necesario proceder á la descarga, el capitan deberá pedir al juez ó tribunal competente autorizacion para el alijo y llevarlo á cabo con conocimiento del interesado ó representante de la carga si lo hubiere.

En puerto extranjero corresponderá dar la autoridad al cónsul español donde le haya.

En el primer caso serán los gastos de cuenta del naviero, y en

perly repaired, provisioned, fitted out, or arranged suitably for the voyage, or from any error on the captain's part.

4. If in the act causing the average there was any malice, negligence, thoughtlessness, or unskilfulness on the captain's part.

§ 821. The expenses of the putting into a port of refuge are always to the shipowner's or lessor's account; but he is not responsible for any detriment which may happen to the shippers in consequence of the putting in, provided that this was legitimate (*k*).

If otherwise, the shipowner and the captain are jointly responsible.

§ 822. If in order to repair the ship, or because there was reason to fear that the cargo might have sustained damage, it is thought necessary to discharge it, the captain must obtain a permit from the proper court for that purpose, and conduct it with the cognizance of any agent or party interested in the cargo that may be on the spot.

In a foreign port the Spanish consul must authorize the proceeding.

In the former case the expenses are at the shipowner's charge, and

(*k*) The costs of putting into a port of refuge are *in practice* treated as general average if the damage which necessitated the bearing up were itself general average. It is to be regretted that the Code has not legalized this practice, and drawn the law in conformity with Rules VII. and VIII., York-Antwerp (1877).

el segundo correrán á cargo de los dueños de las mercaderías en cuyo beneficio se hizo la operacion.

Si la descarga se verificará por ambas causas, los gastos se distribuirán proporcionalmente entre el valor del buque y el del cargamento.

§ 823. La custodia y conservacion del cargamento desembarcado estará á cargo del capitan, que responderá de el á no mediar fuerza mayor.

§ 824. Si apareciere averiado todo el cargamento ó parte de el, ó hubiere peligro inminente de que averiase, podrá el capitan pedir al juez ó tribunal competente ó al consul, en su caso, la venta del todo ó parte de aquel, y el que de esto deba conocer autorizarla, previo reconocimiento y declaracion de peritos, anuncios y demás formalidades del caso, y anotacion en el libro, conforme se previene en el art. 624.

El capitan justificará en su caso la legalidad de su proceder, so pena de responder al cargador del precio que habrian alcanzado las mercaderías llegando en buen estado al puerto de su destino.

§ 825. El capitan responderá de los perjuicios que cause su dilacion, si cesando el motivo que dió lugar á la arribada forzosa no continuase el viaje.

Si el motivo de la arribada hubiere sido el temor de enemigos,

in the second at that of the owners of the goods for whose benefit the measure is taken.

If the discharge is certified to be for both reasons, the expenses are to be divided in proportion between the value of ship and cargo.

§ 823. The custody and care of the discharged cargo falls on the captain, who is responsible for it, excepting for cases of *force majeure*.

§ 824. If the whole or part of the cargo appears to be damaged, or there is imminent risk of its being spoiled, the captain may request a permit of sale of the whole or part, from the judge or the proper court or the consul, who upon this will authorize it, after a survey and declaration of experts, advertisements, and other due formalities, and having it registered as provided in § 624.

The captain must justify the legality of his proceeding under pain of being responsible to the shipper for the difference of price which the goods would have fetched had they reached the port of destination in safety.

§ 825. The captain will be held responsible for any harm caused by his delay, if he does not continue the voyage as soon as the reason for his putting in ceases to exist.

If such reason was the fear of enemies, corsairs, or pirates, he

corsarios ó piratas, precederán á la salida deliberacion y acuerdo en junta de oficiales del buque é interesados en la carga que se hallaren presentes, en conformidad con lo dispuesto en el art. 819.

TIT. V. SECT. I.

DE LA JUSTIFICACION Y LIQUIDACION
DE LAS AVERIAS.

§ 846. Los interesados en la justificacion y liquidacion de las averias podrán convenirse y obligarse mutuamente en cualquier tiempo acerca de la responsabilidad, liquidacion y pago de ellas.

A falta de convenios, se observarán las reglas siguientes:—

1ª. La justificacion de la averia se verificará en el puerto donde se hagan las reparaciones, si fueren necesarias, ó en el de descarga.

2ª. La liquidacion se hará en el puerto de descarga si fuere español.

3ª. Si la averia hubiere ocurrido fuera de las aguas jurisdiccionales de España, ó se hubiere vendido la carga en puerto extranjero por arribada forzosa, se hará la liquidacion en el puerto de arribada.

4ª. Si la avería hubiese ocurrido cerca del puerto del destino, de modo que se pueda arribar á dicho puerto, en él se practicarán las operaciones de que tratan los numeros 1º y 2º.

must, before leaving the port, call a council of his officers and of those interested in the cargo who may be on the spot, agreeably to § 819.

TIT. V. SECT. I.

OF THE PROOF AND LIQUIDATION
OF AVERAGES.

§ 846. The parties interested in the proof and liquidation of the average may meet and bind themselves mutually to a certain time, as to the responsibility, liquidation, and payment thereof.

Failing such agreements, the following rules hold good:—

1. The proof of the average is to be certified at the port where repairs are made if they were necessary, or at that of discharge.

2. The liquidation to be made at the port of discharge if a Spanish one.

3. If the average has occurred outside the jurisdiction of Spain, or the cargo been sold at a port of refuge in some foreign country, the liquidation to be made at that port of refuge.

4. If the average occurred near the port of destination, so that the ship could put into that port, then the measures spoken of in Nos. 1 and 2 come into force.

§ 847. Tanto en el caso de hacerse la liquidacion de las averias privadamente en virtud de lo convenido, como en el de intervenir la autoridad judicial á peticion de cualquiera de los interesados no conformes, todos serán citados y oídos si no hubieren renunciado á ello.

Cuando no se hallaren presentes ó no tuvieren legítimo representante, se hará la liquidacion por el cónsul en puerto extranjero, y donde no lo hubiere, por el juez ó tribunal competente, segun las leyes del pais, y por cuenta de quien corresponda.

Cuando el representante sea persona conocida en el lugar donde se haga la liquidacion, se admitirá y producirá efecto legal su intervencion, aunque sólo esté autorizado por carta del naviero, del cargador ó del asegurador.

§ 848. Las demandas sobre averias no serán admisibles si no excedieren del 5 por 100 del interés que el demandante tenga en el buque ó en el cargamento siendo gruesas, y del 1 por 100 del efecto averiado si fueren simples, deduciéndose en ambos casos los gastos de tasacion, salvo pacto en contrario.

§ 849. Los daños, averías, prestamos á la gruesa y sus premios, y cualesquiera otras pérdidas, no devengarán interés de demora sino pasado el plazo de tres dias, á contar desde el en que la liqui-

§ 847. Both in the case of the affair being privately adjusted by agreement, and of the judicial authority intervening at the request of some dissentient party interested, every one must be summoned and heard unless they have renounced.

If there are no parties present, and no lawful agent, the liquidation must be drawn up by the consul in a foreign port, or else by the judge of the proper tribunal, according to the laws of the country, and on account of whom it may concern.

If the agent be a person well known at the place where the liquidation is made, he is to be received, and his intervention admitted as lawful, although he be only authorized by letter from the shipowner, shipper, or underwriter.

§ 848. No demand for average is admissible, unless it exceeds 5 per cent. of the interest which the party claiming has in the ship or cargo as to general average, or 1 per cent. of the property damaged as to particular average, unless otherwise agreed.

§ 849. Damages, losses, bottomry loans and premiums, and any other losses, do not begin to have interest for delay, till three days have passed after the liquidation is finished and communi-

dacion haya sido terminado y comunicada á los interesados en el buque, en la carga, ó en ambas cosas á la vez.

§ 850. Si por consecuencia de uno ó varios accidentes de mar ocurrieren en un mismo viaje averías simples y gruesas del buque, del cargamento ó de ambos, se determinarán con separacion los gastos y daños pertenecientes á cada avería en el puerto donde se hagan las reparaciones, ó se descarguen, vendan ó beneficien las mercaderías.

Al efecto los capitanes estarán obligados á exigir de los peritos tasadores y de los maestros que ejecuten las reparaciones, así como de los que tasan ó intervengan en la descarga, saneamiento, venta ó beneficio de las mercaderías, que en sus tasaciones ó presupuestos y cuentas pongan con toda exactitud y separacion los daños y gastos pertenecientes á cada avería, y en los de cada avería los correspondientes al buque y al cargamento, expresando tambien con separacion si hay ó no daños que procedan de vicio propio de la cosa y no de accidente de mar; y en el caso de que hubiere gastos comunes á las diferentes averías y al buque y su carga, se deberá calcular lo que corresponda por cada concepto y expresarlo distintamente.

ated to the parties interested in ship, or cargo, or both together.

§ 850. If, in consequence of one or more disasters at sea, there have occurred in the same voyage both general and particular averages to ship or cargo, or both, the expenses and damages belonging to each must be settled at the port where the repairs are effected, or the goods discharged, sold, or reconditioned.

The captains must exact from the experts who survey and from the master shipwrights who repair, and from those who superintend and appraise at the discharge, repair, sale, or reconditioning of the goods, that in all their estimates and reports and accounts they shall separate carefully the damage and expenses belonging to each average, and in each what belongs to ship and what to cargo, and also distinguish the damage which has been the result of *vice propre*, and not of an accident of the sea; and should there be expenses common to the different averages and to ship and cargo, they must calculate what belongs to each and detail it exactly.

SECT. II.

DE LA LIQUIDACION DE LAS AVERIAS
GRUESAS.

§ 851. A instancia del capitan se procederá privadamente, mediante el acuerdo de todos los interesados, al arreglo, liquidacion y distribucion de las averías gruesas.

A este efecto, dentro de las cuarenta y ocho horas siguientes á la llegada del buque al puerto el capitan convocará á todos los interesados para que resuelvan si el arreglo ó liquidacion de las averias gruesas habrá de hacerse por peritos y liquidadores nombrados por ellos mismos, en cuyo caso se hará así, habiendo conformidad entre los interesados.

No siendo la avenencia posible, el capitan acudirá al tribunal competente, que lo será el del puerto donde hayan de practicarse aquellas diligencias conforme á las disposiciones de este Código, ó al cónsul de España, si lo hubiese, y si no á la autoridad local cuando hayan de verificarse en puerto extranjero.

§ 852. Si el capitan no cumpliera con lo dispuesto en el artículo anterior, el naviero ó los cargadores reclamarán la liquidacion, sin perjuicio de la accion que les corresponda para pedirle indemnizacion.

§ 853. Nombrados los peritos por los interesados ó por el tribunal, procederán, previa la aceptacion, al reconocimiento del buque y de

SECT. II.

OF THE LIQUIDATION OF GENERAL
AVERAGE.

§ 851. At the instance of the captain the adjustment, liquidation, and distribution of the general average will be drawn up privately with the consent of all parties interested.

For this end, within four-and-twenty hours of the arrival of the ship into port, the captain must request all parties interested to determine whether they will agree to have the liquidation drawn up by experts and adjusters nominated amongst themselves, in which case so it shall be done if the parties interested are agreed.

If no agreement is possible, the captain must have recourse to the proper court for such affairs according to the provisions of this Code, or to the consul, if there be one, or if not to the local authority if it be in a foreign port.

§ 852. If the captain does not comply with the regulations of the previous article, the shipowner or the shippers can demand the liquidation without prejudice to their right to claim indemnification.

§ 853. The experts who are nominated by the parties concerned, or by the court, shall proceed, after accepting the charge, to

las reparaciones que necesite y á la tasacion de su importe, distinguiendo estas pérdidas y daños de los que provengan de vicio propio de las cosas.

Tambien declararán los peritos si pueden ejecutarse las reparaciones desde luego, ó si es necesario descargar el buque para reconocerlo y repararlo.

Respecto á las mercaderías, si la averia fuere perceptible á la simple vista, deberá verificarse su reconocimiento antes de entregarlas. No apareciendo á la vista al tiempo de la descarga, podrá hacerse despues de su entrega, siempre que se verifique dentro de las cuarenta y ocho horas de la descarga y sin perjuicio de las demas pruebas que estimen conveniente los peritos.

§ 854. La evaluacion de los objetos que hayan de contribuir á la averia gruesa, y la de los que constituyen la averia, se sujetará á las reglas siguientes:

1ª. Las mercaderías salvadas que hayan de contribuir al pago de la averia gruesa se valorarán al precio corriente en el puerto de descarga, deducidos fletes, derechos de aduanas y gastos de desembarque, segun lo que aparezca de la inspeccion material de las mismas, prescindiendo de lo que resulte de los conocimientos, salvo pacto en contrario.

2ª. Si hubiere de hacerse la liquidacion en el puerto de salida, el

survey the vessel and the repairs required, and to estimate the amount, distinguishing those losses and damages which proceed from the inherent defect (*vice propre*) of the things.

The experts shall also state if the repairs can be effected as she is, or if it will be needful to discharge the ship in order to survey and repair her.

With respect to the merchandise, if the damage is evident, it should be surveyed before delivering it. If there is nothing to be seen at the time of discharge, it may be surveyed afterwards, but this must be certified within forty-eight hours after the discharge, and without prejudice to other proofs which the experts may think fit.

§ 854. The valuation of things which have to contribute in general average, and of those which constitute the average, is subject to the following rules:

1. The goods saved, which have to contribute to pay the general average, are to be valued at the price current at the port of discharge, deducting freight, also customs duties and unloading charges, according to their appearance under inspection, without reference to the bills of lading, unless there was an agreement to the contrary.

2. If the liquidation is to be made at the port of sailing, the

valor de las mercaderías cargadas se fijará por el precio de compra con los gastos hasta ponerlas á bordo, excluido el premio del seguro.

3^a. Si las mercaderías estuvieren averiadas, se apreciarán por su valor real.

4^a. Si el viaje se hubiere interrumpido, las mercaderías se hubieren vendido en el extranjero y la avería no pudiese regularse, se tomará por capital contribuyente el valor de las mercaderías en el puerto de arribada ó el producto líquido obtenido en su venta.

5^a. Las mercaderías perdidas que constituyeren la avería gruesa se apreciarán por el valor que tengan las de su clase en el puerto de descarga, con tal que consten en los conocimientos sus especies y calidades; y no constando, se estará á lo que resulte de las facturas de compra expedidas en el puerto de embarque, aumentando á su importe los gastos y fletes causados posteriormente.

6^a. Los palos cortados, las velas, cables y demás aparejos del buque inutilizados con el objeto de salvarlo, se apreciarán según el valor corriente, descontando una tercera parte por diferencia de nuevo á viejo.

Esta rebaja no se hará en las anclas y cadenas.

value of the goods loaded is to be fixed at the price of purchase with the cost of putting them on board, exclusive of the premium of insurance.

3. If the goods are damaged they are to be taken at their actual value.

4. If the voyage is interrupted, the goods sold at a foreign port, and the average cannot be adjusted, the value of the goods at the port of refuge or the net proceeds of their sale must be taken as the contributory capital.

5. The goods lost which constitute the general average are to be valued at the price such goods would have at the port of discharge, having reference to the species and quality shown by the bills of lading; and if this cannot be done, they must be taken at their invoice cost with shipment at the port of loading, adding the charges and freight subsequently incurred.

6. Masts cut away, sails, cables, and other apparel destroyed to save the ship shall be valued at the price current, deducting one-third for difference between new and old.

This deduction is not made on anchors and chains.

7a. El buque se tasará por su valor real en el estado en que se encuentre.

8a. Los fletes representarán el 50 por 100 como capital contribuyente.

§ 855. Las mercaderías cargadas en el combés del buque contribuirán á la avería gruesa si se salvaren; pero no darán derecho á indemnización si se perdieren, habiendo sido arrojadas al mar por salvamento común, salvo cuando en la navegación de cabotaje permitieren las ordenanzas marítimas su carga en esa forma.

Lo mismo sucederá con las que existan á bordo y no consten comprendidas en los conocimientos ó inventarios, según los casos.

En todo caso el fletante y el capitán responderán á los cargadores de los perjuicios de la echazón, si la colocación en el combés se hubiere hecho sin consentimiento de éstos.

§ 856. No contribuirán á la avería gruesa las municiones de boca y guerra que lleve el buque, ni las ropas ni vestidos de uso de su capitán, oficiales y tripulación.

También quedarán exceptuados las ropas y vestidos de uso de los cargadores, sobrecargos y pasajeros que al tiempo de la echazón se encuentren á bordo.

Los efectos arrojados tampoco contribuirán al pago de las averías

7. The ship shall be valued at her actual value in the state in which she is found.

8. The freights shall be taken at 50 per cent. as contributory capital.

§ 855. Goods laden on deck shall contribute to the general average if saved; but they have no right to compensation if lost through being jettisoned for the common safety, except when in the coasting trade the maritime laws allow cargo to be thus carried.

The same is the case with articles carried on board but not mentioned in the bills of lading or inventory, according to circumstances.

In all cases the shipowner and the captain will be responsible to the shippers for damages caused by the jettison, if the goods were stowed on deck without their consent.

§ 856. Victuals and ammunition carried on board do not contribute in general average, nor articles of personal use or clothes worn by the captain, officers, or crew.

Also are excepted such articles and clothes worn by shippers, supercargoes, and passengers on board at the time of the jettison.

Nor do things jettisoned contribute to general average occurring

gruesas que ocurran á las mercaderías salvadas en riesgo diferente y posterior.

§ 857. Terminada por los peritos la valuación de los efectos salvados y de los perdidos que constituyan la avería gruesa, hechas las reparaciones del buque, si hubiere lugar á ello, y aprobadas en este caso las cuentas de las mismas por los interesados ó por el juez ó tribunal, pasará el expediente íntegro al liquidador nombrado para que proceda á la distribución de la avería.

§ 858. Para verificar la liquidación examinará el liquidador la protesta del capitán, comprobándola, si fuere necesario, con el libro de navegación, y todos los contratos que hubieren mediado entre los interesados en la avería, las tasaciones, reconocimientos periciales y cuentas de reparaciones hechas. Si por resultado de este examen hallare en el procedimiento algun defecto que pueda lastimar los derechos de los interesados ó afectar la responsabilidad del capitán, llamará sobre ello la atención para que se subsane, siendo posible, y en otro caso lo consignará en los preliminares de la liquidación.

Enseguida procederá á la distribución del importe de la avería, para lo cual fijará:

1º. El capital contribuyente, que determinará por el importe del

to the goods saved in a different and later peril.

§ 857. When the experts have concluded their survey of the goods saved and losses which make up the general average, and the ship is repaired, if need be, and in this case if the accounts of the same have been approved by the parties interested or by the judge or court, all the documents must be handed over to the appointed adjuster that he may proceed to distribute the average.

§ 858. In order to certify the adjustment the adjuster must examine the captain's protest, comparing it if need be with the log-book, and all the agreements made between any parties interested, the valuations, surveys, and accounts of the repairs. If he finds any defect which may concern the parties interested or affect the captain's responsibility, he will call attention to have it explained if possible, or otherwise will note it down in the preamble to the adjustment.

He will then proceed to apportion the amount of the average, determining as follows:

1. The contributory capital, which he will fix by the value of

valor del cargamento, conforme á las reglas establecidas en el § 854.

2°. El del buque en el estado que tenga, segun la declaracion de peritos.

3°. El 50 por 100 del importe del flete, rebajando el 50 por 100 restante por salarios y alimentos de la tripulacion.

Determinada la suma de la avería gruesa conforme á lo dispuesto en este Código, se distribuirá á prorrata entre los valores llamados á costearla.

§ 859. Los aseguradores del buque, del flete y de la carga estarán obligados á pagar por la indemnizacion de la avería gruesa tanto cuanto se exija á cada uno de estos objetos respectivamente.

§ 860. Si no obstante la echazon de mercaderías, rompimiento de palos, cuerdas y aparejos, se perdiere el buque corriendo el mismo riesgo, no habrá lugar á contribucion alguna por avería gruesa.

Los dueños de los efectos salvados no serán responsables á la indemnizacion de los arrojados al mar, perdidos ó deteriorados.

§ 861. Si después de haberse salvado el buque del riesgo que dió lugar á la echazón se perdiere por otro accidente ocurrido durante el viaje, los efectos salvados y subsistentes del primer riesgo continuarán afectos á la contribución de la avería gruesa, según su valor en

the cargo according to the rules laid down in § 854.

2. The value of the ship in the state in which she is found according to the expert's report.

3. Fifty per cent. of the gross amount of the freight, the other fifty per cent. being deducted for wages and food of the crew.

The sum total of the general average, being fixed according to the provisions of this Code, is to be apportioned *pro ratâ* among the values which have to meet it.

§ 859. The underwriters of ship, freight, and cargo shall be bound to pay for compensation in general average as much as is required from each one of these objects respectively.

§ 860. If notwithstanding the jettison of goods, breaking of masts, ropes, and tackle, the ship is lost in the same peril, there is no ground for any contribution in general average.

The owners of the effects saved shall not be liable to make good those jettisoned, lost, or damaged.

§ 861. If after having been saved from the risk which gave occasion to the jettison, the vessel should be lost in another accident during the voyage, the goods saved and remaining after the first peril are liable to contribute in general average, according to their value

el estado en que se encuentren, deduciendo los gastos hechos para su salvamento.

§ 862. Si á pesar de haberse salvado el buque y la carga por consecuencia del corte de palos ó de otro daño inferido al buque deliberadamente con aquel objeto, luego se perdieren ó fueren robadas las mercaderías, el capitán no podrá exigir de los cargadores ó consignatarios que contribuyan á la indemnización de la avería, excepto si la pérdida ocurriere por hecho del mismo dueño ó consignatario.

§ 863. Si el dueño de las mercaderías arrojadas al mar las recobrase después de haber recibido la indemnización de avería gruesa, estará obligado á devolver al capitán y á los demás interesados en el cargamento la cantidad que hubiere percibido, deduciendo el importe del perjuicio causado por la echazón y de los gastos hechos para recobrarlas.

En este caso, la cantidad devuelta se distribuirá entre el buque y los interesados en la carga, en la misma proporción con que hubieren contribuido al pago de la avería.

§ 864. Si el propietario de los efectos arrojados los recobrare sin haber reclamado indemnización, no estará obligado á contribuir al

in the state in which they were found, deducting salvage expenses.

§ 862. If, notwithstanding that ship and cargo have been saved in consequence of cutting away masts or other damage inflicted intentionally on the ship with that object, the goods are afterwards lost or stolen, the captain cannot claim from the shippers or consignees that they should contribute to make good the average, unless the loss was occasioned by the act of the same owner or consignee.

§ 863. If the owner of goods jettisoned should recover them after having received compensation in general average, he must restore to the captain and other parties concerned the amount he has received, deducting the value of the damage caused by the jettison, and the salvage charges.

In this case, the amount returned must be divided between the ship and the parties interested in the cargo in the proportion in which they contributed to the average.

§ 864. If the owner of goods jettisoned should recover them, without having claimed compensation, he is not bound to contribute

pago de las averías gruesas que hubieren ocurrido al resto del cargamento despues de la echazon.

§ 865. El repartimiento de la avería gruesa no tendrá fuerza ejecutiva hasta que haya recaído la conformidad, ó en su defecto la aprobacion del juez ó tribunal civil previo exámen de la liquidacion y audiencia instructiva de los interesados presentes ó de sus representantes.

§ 866. Aprobada la liquidacion, corresponderá al capitán hacer efectivo el importe del repartimiento, y será responsable á los dueños de las cosas averiadas de los perjuicios que por su morosidad ó negligencia se les sigan.

§ 867. Si los contribuyentes dejaren de hacer efectivo el importe del repartimiento en el término de tercer día despues de haber sido á ello requeridos, se procederá, á solicitud del capitán, contra los efectos salvados hasta verificar el pago con su producto.

§ 868. Si el interesado en recibir los efectos salvados no diere fianza suficiente para responder de la parte correspondiente á la avería gruesa, el capitán podrá diferir la entrega de aquéllos hasta que se haya verificado el pago.

to general average which may have occurred to the rest of the cargo after the jettison.

§ 865. The apportionment of the general average is not to be put into force until it has received the consent of the parties, or, failing that, the approval of the judge or civil court, after examination of the adjustment and hearing the parties interested who may be present, or their agents.

§ 866. If the adjustment is approved, it is for the captain to carry out the distribution, and he will be responsible to the owners of the things damaged for any loss caused by his delay or negligence.

§ 867. If the contributory parties do not effect a settlement within three days of demand, proceedings may be taken at the captain's desire, against the goods saved, to realize them for the payment.

§ 868. If the party entitled to receive the goods saved will not give sufficient security for his share of the general average, the captain may defer the delivery of them until the payment is guaranteed.

§ 657. Si durante el viaje quedare el buque inservible, el capitán estará obligado á fletar á su costa otro en buenas condiciones, que reciba la carga y la portee a su destino, á cuyo efecto tendrá obligación de buscar buque, no sólo en el puerto de arribada, sino en los inmediatos hasta la distancia de 150 kilómetros.

Si el capitán no proporcionare, por indolencia ó malicia, buque que conduzca el cargamento á su destino, los cargadores, previo un requerimiento al capitán para que en término improrrogable procure flete, podrán contratar el fletamento acudiendo á la autoridad judicial en solicitud de que sumariamente apruebe el contrato que hubieren hecho.

La misma autoridad obligará por la vía de apremio al capitán á que por su cuenta, y bajo su responsabilidad, se lleve á efecto el fletamento hecho por los cargadores.

Si el capitán, á pesar de su diligencia, no encontrare buque para el flete, depositará la carga á disposición de los cargadores, á quienes dará cuenta de lo ocurrido en la primera ocasión que se le presente, regulándose en estos casos el flete por la distancia recorrida por el buque, sin que haya lugar á indemnización alguna.

§ 659. Devengarán flete las mercancías vendidas por el capitán para atender á la reparación indis-

§ 657. If during the voyage the ship becomes unserviceable, the captain ought to charter at his own cost another vessel in good condition, to take in the cargo and carry it to its destination, for which purpose he must look out for a ship, not only at the port of refuge, but in intermediate ports within 150 kilometres.

If the captain, through indolence or malice, does not hire a ship to carry the cargo on, the shippers, after requesting him to do so within a certain date, may themselves charter a ship, under the approval of the judicial authority as to the contract made.

The same authority will oblige the captain to carry out the contract of affreightment which has been arranged by the shippers, on his own account and under his own responsibility.

Should the captain not succeed, in spite of all his efforts, in finding a vessel to carry the cargo on, he must warehouse it to the shipper's order, to whom he must report the case as quickly as possible, and in these circumstances the freight is adjusted according to the distance run, without any occasion for compensation.

§ 659. Freight is due for goods sold by the captain to meet the indispensable repairs of the hull,

pensable del casco, maquinaria ó aparejo, ó para necesidades imprescindibles y urgentes.

El precio de estas mercaderías se fijará segun el éxito de la expedición, á saber:

1°. Si el buque llegare á salvo al puerto del destino, el capitán las abonará al precio que obtengan las de la misma clase que en él se vendan.

2°. Si el buque se perdiere, al que hubieran obtenido en venta las mercaderías.

La misma regla se observará en el abono del flete, que será entero si el buque llegare á su destino, y en proporción de la distancia recorrida si se hubiere perdido antes.

§ 660. No devengarán flete las mercaderías arrojadas al mar por razón de salvamento común; pero su importe será considerado como avería gruesa, contándose aquél en proporción á la distancia recorrida cuando fueron arrojadas.

§ 661. Tampoco devengarán flete las mercaderías que se hubieren perdido por naufragio ó varada, ni las que fueren presa de piratas ó enemigos.

Si se hubiere recibido el flete por adelantado, se devolverá, á no mediar pacto en contrario.

§ 662. Rescatándose el buque ó las mercaderías, ó salvándose los efectos del naufragio, se pagará el

engines, or tackle, or for urgent necessities.

The price of these goods is to be fixed according to the result of the voyage, in this way:

1. If the ship reaches her port of destination in safety, the captain must make good the price realized by goods of the same class as those sold.

2. If the ship is lost, that for which the goods were sold.

The same rule holds good as to compensation for freight, which is to be full freight if the ship reaches its destination, and in proportion to the distance run if it was previously lost.

§ 660. Freight is not due for goods jettisoned for the common safety; but its amount is treated as general average, taking it in proportion to the distance run when they were jettisoned.

§ 661. Nor is freight due for goods which have been lost in shipwreck or stranding, nor for those which have been captured by pirates or enemies.

If advance freight has been received it must be returned, if there has been no stipulation to the contrary.

§ 662. If the ship or cargo are ransomed, or if goods are saved from shipwreck, freight corre-

flete, que corresponda á la distancia recorrida por el buque portando la carga: y si reparado la llevare hasta el puerto del destino se abonará el flete por entero, sin perjuicio de lo que corresponda sobre la avería.

§ 663. Las mercaderías que sufran deterioro ó disminución por vicio propio ó mala calidad y condición de los envases, ó por caso fortuito, devengarán el flete íntegro y tal como se hubiere estipulado en el contrato de fletamento.

§ 664. El aumento natural que en peso ó en medida tengan las mercaderías cargadas en el buque, cederá en beneficio del dueño y devengará el flete correspondiente fijado en el contrato para las mismas.

§ 665. El cargamento estará especialmente afecto al pago de los fletes, de los gastos y derechos causados por el mismo que deban reembolsar los cargadores, y de la parte que pueda corresponderle en avería gruesa, pero no será lícito al capitán dilatar la descarga por recelo de que deje de cumplirse esta obligación.

Si existiere motivo de desconfianza, el juez ó tribunal, á instancia del capitán, podrá acordar el depósito de las mercaderías hasta que sea completamente reintegrado.

§ 666. El capitán podrá solicitar la venta del cargamento en la pro-

sponding to the distance run by the ship that carried the cargo shall be paid; and if the ship is repaired and carries its cargo on to the port of destination, freight in full is allowed, without prejudice to the responsibility for the average.

§ 663. Goods suffering deterioration or diminution on account of *vice propre* or bad quality and condition of the things in which they are packed, or from accident, shall pay freight in full as agreed in the contract of affreightment.

§ 664. Any natural increase in weight or measure accruing to goods carried shall be to the benefit of their owners, and freight shall be paid according to the contract for the same.

§ 665. The cargo shall be specially charged with the payment of (subject to *lien* for) freight, expenses and dues incurred by it, which the shippers must reimburse, and also of its corresponding share in general average, but the captain may not delay the discharge from apprehension lest this obligation should not be fulfilled.

If there is reason for want of confidence, the judge or court may, at the captain's instance, allow the goods to be warehoused until full assurance is given.

§ 666. The captain may demand the sale of sufficient cargo to pay

porcion necesaria para el pago del flete, gastos y averías que le correspondan, reservándose el derecho de reclamar el resto de lo que por estos conceptos le fuere debido, si lo realizado por la venta no bastase á cubrir su crédito.

§ 667. Los efectos cargados estarán obligados preferentemente á la responsabilidad de sus fletes y gastos durante veinte días á contar desde su entrega ó depósito. Durante este plazo, se podrá solicitar la venta de los mismos, aunque haya otros acreedores y ocurra el caso de quiebra del cargador ó del consignatario.

Este derecho no podrá ejercitarse sin embargo, sobre los efectos que despues de la entrega hubieren pasado á una tercera persona sin malicia de ésta y por título oneroso.

§ 668. Si el consignatario no fuese hallado, ó se negare á recibir el cargamento, deberá el juez ó tribunal, á instancia del capitán, decretar su depósito y disponer la venta de lo que fuere necesario para el pago de los fletes y demás gastos que pesaren sobre él.

Asimismo tendrá lugar la venta cuando los efectos depositados ofrecieren riesgos de deterioro, ó por sus condiciones ú otras circunstancias los gastos de conservación y custodia fueren desproporcionados.

§ 677. Subsistirá el contrato de fletamento si, careciendo el capitán

freight, charges, and average claims, reserving the right to claim the rest for what is due to him on these accounts, if the proceeds of the sale are not enough to cover his claim.

§ 667. There is a preferential claim on goods carried, for freight and expenses, for twenty days counting from their delivery or deposit. During this period their sale may be required, even if there are other creditors, or the shipper or consignee is bankrupt.

This claim cannot be exercised without embargo on goods which, after delivery, have passed into the hands of a third party, without fraud, and for valuable consideration.

§ 668. If the consignee can not be found, or if he should refuse to receive the cargo, then the judge or court may, at the captain's instance, order it to be warehoused, and authorize the sale of as much as was wanted to pay freight and other charges upon it.

A sale may also be made should the goods show signs of spoiling, or should the costs of their storage and custody be excessive, owing to their condition, or other circumstances.

§ 677. The contract of affreightment holds good if, failing instruc-

de instrucciones del fletador, sobreviniere durante la navegacion declaracion de guerra ó bloqueo. En tal caso el capitan deberá dirigirse al puerto neutral y seguro más cercano, pidiendo y aguardando órdenes del cargador, y los gastos y salarios devengados en la detencion se pagarán como avería comun.

Si por disposicion del cargador se hiciere la descarga en el puerto de arribada, se devengará por entero el flete de ida.

§ 683. En caso de arribada para reparar el casco del buque, maquinaria ó aparejos, los cargadores deberán esperar á que el buque se repare, pudiendo descargarlo á su costa si lo estimaren conveniente.

Si en beneficio del cargamento expuesto á deterioro dispusieren los cargadores, ó el tribunal, ó el cónsul, ó la autoridad competente en país extranjero, hacer la descarga de las mercaderías, serán de cuenta de aquéllos los gastos de descarga y recarga.

§ 684. Si el fletador, sin concurrir alguno de los casos de fuerza mayor expresados en el artículo precedente, quisiere descargar sus mercaderías antes de llegar al puerto de su destino, pagará el flete por entero, los gastos de la arribada que se hiciere á su instancia, y los daños y perjuicios que se causaren á los demás cargadores si los hubiere.

tions to the captain from the shipper, there should occur during the voyage a declaration of war, or blockade. In such a case the captain should make for the nearest safe neutral port, asking and waiting for orders from the shipper, and the expenses and wages during the detention shall be paid as general average.

If the shipper orders the cargo to be discharged in the port of refuge, freight in full must be paid on it.

§ 683. In case of putting in to repair the ship's hull, machinery, or rigging, the shippers must wait whilst the repairs are effected, discharging at their own cost if they think fit.

If to benefit a cargo exposed to deterioration a discharge should be ordered either by the shippers, or the court, or consul, or proper authority in foreign parts, the cost of discharge and reloading shall be borne by the shipper.

§ 684. Should the shipper, without any of the cases of *force majeure* enumerated in the preceding article taking place, desire to discharge his goods before they reach the port of destination, he must pay freight in full, the expenses of putting into port at his instance, and any damage or losses occasioned thereby to the other shippers, if there be any.

§ 685. En los fletamentos á carga general, cualquiera de los cargadores podrá descargar las mercaderías, antes de emprender su viaje, pagando medio flete, el gasto de estivar y reestivar, y cualquier otro perjuicio que por esta causa se origine á los demás cargadores.

§ 686. Hecha la descarga y puesto el cargamento á disposicion del consignatario, éste deberá pagar inmediatamente al capitán el flete devengado y los demás gastos de que fuere responsable dicho cargamento.

La capa deberá satisfacerse en la misma proporcion y tiempo que los fletes, rigiendo en cuanto á ella todas las alteraciones y modificaciones á que éstos estuvieren sujetos.

§ 687. Los fletadores y cargadores no podrán hacer, para el pago del flete y demás gastos, abandono de las mercaderías averiadas por vicio propio ó caso fortuito.

Procederá, sin embargo, el abandono si el cargamento consistiere en líquidos y se hubieren derramado, no quedando en los envases sino una cuarta parte de su contenido.

§ 691. Si el buque no pudiere hacerse á la mar por cerramiento del puerto de salida ú otra causa pasajera, el fletamento subsistirá, sin que ninguna de las partes tenga derecho á reclamar perjuicios.

Los alimentos y salarios de la

§ 685. In affreightments for a general cargo, any one of the shippers may discharge his goods before the voyage begins on payment of half freight, and the expenses of stowing and restowing, and any damage done to the cargo of other shippers.

§ 686. When the discharge is effected, and the cargo placed at the disposal of the consignee, he must at once pay the captain the freight earned, and other charges falling upon the cargo.

Primage to be paid in the same proportion and time as freight, all the alterations and modifications applying to the latter governing also the former.

§ 687. Freighters and shippers cannot, in payment of freight and other charges, abandon goods which have been damaged by *vice propre* or accident.

If the cargo, however, is of liquids, and they have leaked so as only to leave a fourth part of their contents in the casks, they may be abandoned.

§ 691. If the ship cannot put to sea because the port is closed, or from any other passing cause, the contract of affreightment holds good without any of the parties having a right to claim damages.

The maintenance and wages of

tripulacion serán considerados avería comun.

Durante la interrupcion, el fletador podrá por su cuenta descargar y cargar á su tiempo las mercaderías, pagando estadias si demorare la recarga despues de haber cesado el motivo de la detencion.

§ 692. Quedará rescindido parcialmente el contrato de fletamento, salvo pacto en contrario, y no tendrá derecho el capitan más que al flete de ida, si por ocurrir durante el viaje la declaracion de guerra, cerramiento de puertos ó interdiccion de relaciones comerciales, arribare el buque al puerto que se le hubiere designado para este caso en las instrucciones del fletador.

§ 732. Los prestadores á la gruesa soportarán á prorrata de su interés respectivo las averías comunes que ocurran en las cosas sobre que se hizo el préstamo.

En las averías simples, á falta de convenio expreso de los contratantes, contribuirá tambien por su interés respectivo el prestador á la gruesa, no perteneciendo á las especies de riesgos exceptuados en el artículo anterior.

the crew are considered general average.

During the interruption, the shipper may, on his own account, discharge or load his goods at his own time, paying for demurrage if he delays the reloading after the reason of the detention has ceased to operate.

§ 692. The contract of affreightment is partially rescinded, if there be no agreement to the contrary, and the captain cannot claim more than the distance freight, if by reason of war being declared in the course of the voyage, the closing of ports, or interdiction of commercial relations, the ship has to put into some port appointed in such event, in the shipper's instructions.

§ 732. Lenders on bottomry shall bear, in proportion to their respective interests, any general average occurring to the things hypothecated.

In particular averages, failing any express stipulation between the parties, the lender on bottomry shall contribute in respect of his particular interest, if the risk is not one excepted in the preceding Article.

APPENDIX U.

THE LAW OF SWEDEN.

The provisions of the Swedish law which treat of general average are contained in the Maritime Law of the 12th June, 1891. This Maritime Law is based on a Bill drawn up by a Swedish committee, appointed on the 8th September, 1882, to revise the maritime legislation, in collaboration with committees appointed in Denmark and Norway for the same purpose. One consequence of this collaboration is that the Swedish Maritime Law corresponds in substance with the Maritime Laws in force in Denmark and Norway.

The seventh chapter of the three Scandinavian Maritime Laws, comprising §§ 187—218, deals with Average. A special chapter, the tenth, comprising §§ 230—266, treats of Marine Insurance. The regulations concerning general average are partly taken from the older Swedish Maritime Law of the 23rd February, 1864, the essential principles of which are founded on German law; in part the former law has been modified in accordance with the tenor of the York-Antwerp Rules and the efforts to bring about international uniformity in maritime legislation. Before the enactment of the Maritime Law of the 23rd February, 1864, maritime commerce was governed by the Maritime Law of the 12th June, 1667, and the Insurance and Average Ordinances of the 2nd October, 1750.

The following translation of portions of the Maritime Law of the 12th June, 1891, can be consulted not only for the provisions of the Swedish law, but also, as the editors have indicated in Appendices H and O, for those of the other Scandinavian States. The few differences in their respective provisions are indicated, and the arrangement and numbering of the sections is the same in all. For the notes to Chapter VII. the editors are indebted to Mr. Per Hasselrot, average adjuster, of Stockholm.

EXTRACTS FROM THE MARITIME LAW OF THE 12th JUNE,
1891.

CHAPTER VII.—AVERAGE.

§ 187 (*a*). All damage intentionally done to ship or cargo in order to save ship and cargo from any danger threatening (*b*) both, as well as every other sacrifice made for such purpose and all damage and loss occasioned thereby (*c*), shall be treated as general average.

General average shall be paid by ship, cargo and freight in the proportion of their respective values, calculated in the manner mentioned in §§ 207—211 (*d*).

§ 188 (*e*). The following items in particular are made good in general average:

1. Cargo (*f*) and any ship's appurtenances jettisoned in order to lighten the ship in distress or to escape enemies or pirates, as also cargo or ship's appurtenances carried away by the seas during the jettison, and further any other damage caused by the jettison or by any of the steps necessitated thereby.
2. Masts, sails and gear cut away, and anchors and chains slipped, in order to save ship and cargo from any danger threatening both, for instance in order to escape stranding or collision, and all damage occasioned thereby (*g*).
3. Any damage done to ship or cargo to prevent fire or to extinguish a fire already broken out, or to allow the

(*a*) This Article is intended to give a general definition of the term "general average."

(*b*) It is sufficient that the danger is threatening; it need not be already operative, nor immediately impending.

(*c*) According to § 189, damage or loss only *indirectly* or *accidentally* connected with the measures for the preservation of ship and cargo is not general average; nor are such expenses as are incurred in the *normal* course of the voyage (which were formerly, but incorrectly, often called "petty average") general average. § 153 of the Maritime Law provides in this respect that the owner of the ship shall pay all shipping dues, towage, quarantine and other similar expenses connected with the voyage, from the loading port to the port of discharge.

(*d*) "§§ 207—222" in the Danish Code.

(*e*) This Article specifies the commonest cases of general average. Some restricting and supplementary provisions are to be found in §§ 189 and 190.

(*f*) Conf. § 190, No. 2, regarding jettison of deck cargo.

(*g*) For instance, damage which the mast causes when falling down on being cut away.

water in the ship access to the pumps, or to free the decks from seas (*h*).

4. The cost of assistance employed in distress to save ship and cargo from any danger threatening both, as well as all damage done to ship or cargo by any ship requested to assist.
5. Any damage done to ship or cargo on account of the ship being intentionally run aground in order to avoid any greater danger threatening both (*i*).
6. Any damage done to ship or cargo and any expense incurred in order to get the ship off the ground and bring her and the cargo into safety. If the voyage is discontinued because the ship cannot be floated, or because she is declared unfit to be repaired (*k*), only such damage and expenses as were incurred before it was discovered that the ship could not proceed, are deemed to be general average (*l*).
7. Any expenses incurred on account of the necessity of seeking a port of refuge for the safety of ship and cargo, for instance when the vessel is no longer seaworthy (*m*), or, when the continuation of the voyage would expose ship and cargo to obvious danger owing to the outbreak of war, or accidental drifting of ice (*n*).

(*h*) This Article should be read in connection with § 190, No. 6.

(*i*) The Danish and Norwegian Codes add at the end of the paragraph the words, "but only in so far as the act may be considered a sacrifice." It follows from this sub-section that damage, which results from the ship not being able to keep the sea and being intentionally run aground, is not always to be reckoned as general average. If ship and cargo are in such distress that total loss is inevitable if the ship be not run aground, this measure does not imply any sacrifice, but only an attempt to save what can be saved. There is then a stranding but not a voluntary one, and consequently no general average. But on the other hand, the apportionment of the average is not unconditionally excluded when the ship is run aground, because she is nearly sinking, or is driving ashore or against rocks. Even in such cases there can be a sacrifice; for instance, if the master could, by jettisoning cargo and pumping, keep the ship afloat until a port is reached, but nevertheless chooses to sacrifice the ship in order to save the valuable cargo.

(*k*) See § 6, *infra*, p. 707.

(*l*) Any sacrifice made for the purpose of saving the ship and cargo when the impossibility of continuing the voyage is, or ought to have been known, is consequently not general average; but the loss falls on the party in whose interest it is incurred. According to § 193, there can be general average even if the ship alone or the cargo alone is wholly or partially saved.

(*m*) Calling at a port of refuge can consequently be general average, even if for the purpose of repairing damage to the ship, which is not general average.

(*n*) By this is meant, for instance, the case of the ship encountering ice in waters where it was not to be expected, and in such movement that she runs the risk of

The following are specially included in the said expenses, *i.e.* :

Pilotage, lighthouse-, beacon-, harbour-, and other shipping dues at the port of refuge (*o*); the cost of discharging, storing, reloading and stowing the cargo, when the discharge is necessary in order to get the ship into the port of refuge, or is found requisite for the same reason that necessitated the vessel's calling at the port of refuge (*p*);

The wages of master and crew and their maintenance at the port of refuge during the ship's stay at such port for the reason which necessitated the call at such port of refuge, unless the said expenses could have been saved by discharging the crew. If, however, the delay is prolonged for any other reason, the wages and maintenance of the master and crew during the prolongation of the stay are not recoverable: as, for instance, when the vessel is delayed from proceeding by ice or any other cause dependent upon the state of the weather, or, when the repairing of the vessel is unnecessarily delayed. Should the voyage be discontinued at the port of refuge, only the expenses incurred previous to the decision as to the continuation of the voyage may be included in the general average.

No diminution of the cargo, on account of evaporation or leakage, nor any other damage sustained by the cargo owing to the delay at the port of refuge, shall be allowed as general average, nor any expense incurred in order to avoid such damage: nor shall damage sustained by the cargo in the discharge or reloading at the port of refuge be considered general average, unless the damage has been sustained because the discharge and reloading had to be effected by means of other vessels or in any other unusual manner (*q*).

driving ashore or of being crushed. Expenses incurred by calling at a port of refuge on account of *hindrance* by ice are not allowed as general average. (See § 190, No. 7.)

(*o*) Outward shipping dues at the port of refuge are general average if the voyage is not discontinued at the port (the common benefit principle).

(*p*) When the discharge is undertaken solely for the benefit of the cargo—for instance, in order to dry it, when wet, so as to prevent further damage—the cost of discharging and reloading is consequently not general average.

(*q*) The difference between this provision and that of the York-Antwerp Rules of 1890 should be noted. For the allowance of damage to the cargo in this case as general average, very convincing evidence is required in practice that the damage is actually the result of the discharge and reloading at the port of refuge having, on account of special circumstances there, been undertaken in an unusual manner involving special danger.

Extra expenses caused at the port of distress on account of the dangerous nature of the cargo, shall not be included in general average.

The expense of the temporary repair at the port of refuge of damage, not reckoned under general average, shall be allowed as general average, provided any expense otherwise necessary and allowable as such average is thereby saved (*r*).

8. Any damage and loss incurred in consequence of the cargo being used in cases of distress to enable the ship to proceed on the voyage, or otherwise for the preservation of ship and cargo, or when, also in cases of distress, the ship's appurtenances are used for other purposes than those for which they were originally intended. General average also includes bunker coals of a steamer or any other stores intended for the working of the engines, used in order to float the ship, to pump the ship when leaking (*s*), or to move the ship to and from the discharging place, or for the actual discharge and reloading at a port of refuge, whenever the cost connected therewith would otherwise be chargeable in general average. Stores consumed (*t*) in making or leaving a port of refuge, or otherwise used on account of any prolongation of the voyage, are, on the other hand, not recoverable, even should such prolongation have been caused by a general average act (*u*).

9. Any damage intentionally done to ship or cargo in order to facilitate a defence against enemies or pirates, or which ship or cargo may suffer during the defence, and the ammunition used for such purpose, as well as any sum or sums paid for rescuing or ransoming the ship and cargo.

10. The expenses of medicine, nursing and subsistence for any

(*r*) The principle of *substituted expenses* has here been employed. This principle may probably be used as a basis for allowance in general average in other analogous cases, although in practice great caution is shown in this matter.

(*s*) Damage to a ship's pumps occasioned by pumping in order to keep the water out is not compensated as general average. (See § 190, No. 4.)

(*t*) The Danish Code reads :—" Expenses caused by making or leaving, &c."

(*u*) This exception has been made for practical reasons. The articles are, however, in this case used for the purpose for which they are intended, although the consumption, in consequence of special circumstances, is increased. The wages of the master and crew, and their maintenance during the voyage to and from the port of refuge, are also not allowed in general average. (See § 188, No. 7.)

person (*v*) injured in a defence against enemies or pirates, or in the execution of any measure taken to save the ship and cargo, and burial expenses for any person killed, as well as any increase of expense suffered by the owner in procuring fresh hands to take the place of those who have been killed or wounded.

11. Freight lost on account of general average (*x*).
12. Any loss and expense incurred in raising funds for the payment of such expenses as are recoverable in general average; *i.e.*, commission, interest and insurance premium on money advanced, bottomry premium when the monies must be obtained by means of a bottomry bond, and any loss incurred through difference of price when goods are sold in order to procure money at a port of refuge.
13. The pay of the agent employed to attend to the matters connected with the average (*y*).

(*v*) The Danish and Norwegian Codes substitute "member of the crew" for "person."

(*x*) Concerning *loss of freight*, § 151 contains the general rule that freight shall not be paid for goods which do not exist at the end of the voyage, unless they have disappeared in consequence of their perishable nature, or in consequence of bad packing, or otherwise through the shipper's fault, or have been sold during the voyage for account of their owner. On the other hand, according to Swedish law, it is not a necessary condition for payment of freight that the goods shall be delivered at the port of destination. In the event of the ship being lost during the voyage, or being declared irreparable (see § 6, *infra*, p. 707), the contract of affreightment ceases to be in force, but *distance freight* is to be paid for goods still remaining. This freight is to be calculated according to the length of that portion already performed of the voyage specified in the contract, in proportion to the whole voyage. Still, proper allowance must be made for the time which the voyage has taken, and the particular difficulties and expenses connected therewith, in comparison with the remaining portion of the voyage. If the parties cannot agree as to the distance freight payable, the amount must be fixed by arbitration. Distance freight is also payable when the contract of affreightment, for other reasons than those just mentioned, is annulled before the completion of the voyage, as when the whole or an essential portion of the cargo, at the port of refuge, is liable to deterioration on account of the delay incurred by the repair of the ship. The owner of the cargo is at liberty to hand over the goods in lieu of the distance freight. Section 151 provides that should freight have been paid in advance for goods, for which, according to what has been stated, the charterer is not bound to pay any freight, such advance shall be refunded, unless some special stipulation has been made. An undertaking by the shipowner to pay the premium for the insurance of the freight advance is considered as implying an agreement that the advance of freight shall not be refunded in case of accident.

(*y*) On the other hand, the *owner* is not considered to be entitled to compensation in general average for personal inconvenience in connection with the average. (Decision of the Supreme Court of 10th January, 1900, concerning *S.S. Norge*.)

14. Any expense in connection with the extending of protest, survey and valuation (*z*), or for procuring evidence required for the adjustment of the average, as well as expenses for drawing up the average adjustment (*Dis-pache*).

§ 189 (*a*). Damage done by accident during the carrying out of some measure for the preservation of ship and cargo, even should a sacrifice thereby be rendered unnecessary, as also any damage and loss only indirectly or accidentally connected with such measure, shall not be included in general average. The following losses are consequently not made good in general average:

1. Topmast broken by the force of the wind during the process of cutting away the mast, even should such cutting away be thereby suspended;
2. Damage to ship, or cargo, by storm, fire, theft or any other accident during the stay at the port of refuge (*b*).
3. Any loss caused by the cargo not being delivered in proper time owing to general average;
4. Any increase in the cost of insurance or any loss of expected freight caused by the delay in connection with the average.

§ 190 (*c*). In general average the following items are not compensated (that is to say):

1. Goods loaded without the master's knowledge, and monies, securities or other valuables, which have not been declared in the manner mentioned in § 143 (*d*).
2. Goods carried as deck cargo (*e*), when jettisoned, or in any

(*z*) The cost of a "control-survey," made by a partner, is not allowed as general average. (Decision of the Supreme Court of 10th January, 1900, concerning *S.S. Norge*.)

(*a*) The object of this Article, as of § 190, is to give in a negative manner a stricter definition of the term "general average."

(*b*) The consequence hereof seems to be, that the cost of averting or providing an indemnity against such damage, for instance the cost of fire insurance, is also not to be allowed as general average. The practice is not quite uniform and clear in this matter.

(*c*) This Article comprises cases which, in conformity with § 188, would be included in general average, but for different reasons are excluded therefrom. The principal point of view may here have been the difficulty (admitting that general average could exist in these cases) of effectually preventing quite ordinary particular damage, such as ordinary wear of gear and engines, from being treated as general average, and in consequence charged to other persons than the one on whom it should primarily fall.

(*d*) See *infra*, p. 711.

(*e*) See § 117, *infra*, p. 711.

similar way sacrificed or damaged, unless the jettison has been effected in order to lighten the ship when aground (*ee*).

Not only are goods stowed on the ship's open decks, or in the ship's boats, or hung over the side considered deck cargo, but also goods loaded in any covered spaces which are not wholly or partially enclosed by the ship's extended sides or do not otherwise afford sufficient security against damage or the danger of being carried away by the seas (*f*).

3. Ship's appurtenances thrown overboard, or in any similar manner sacrificed or damaged, whilst lying on deck at the time, the deck not being their proper place.
4. Damage caused by carrying a press of sail, even if such press is carried to avoid stranding or to escape an enemy or pirates; damage to sails otherwise caused, or any damage to the engines or boilers of a steamer, unless such damage is sustained when endeavouring to float the ship; damage to a ship's pumps while pumping in order to keep the water out (*g*).
5. Any mast, spar or other ship's gear cut away, when previously broken, even should such measure have been necessary to avoid a danger to ship and cargo (*h*).
6. Damage to cargo by water, or by any other measure adopted to extinguish a fire, in case of its heating or igniting spontaneously, and any damage which, in the quenching of a fire otherwise commenced, is suffered by that portion of the cargo which already had caught fire (*i*).
7. Any expense caused by the ship being obliged to call at a port of distress on account of insufficient provisioning, or any other want of proper equipment, or on account of hindrance by ice, or for any other reason dependent upon the state of the weather (*k*).

(*ee*) As here only the *goods* jettisoned are excluded from contribution in general average, it seems according to the general provision in § 188, No. 1, that damage done to the *ship* by jettisoning deck cargo can and ought to be allowed as general average, even when the jettison of the goods is not allowed as such. But this question is not decided by the law Courts, and the practice is in this matter variable and uncertain.

(*f*) This is to be decided according to circumstances, and the expression does not include *every* superstructure.

(*g*) Coals used to work the pumps are allowed in general average: § 188, No. 8.

(*h*) This provision is in conformity with No. 4 of the York-Antwerp Rules, 1890.

(*i*) In neither of these cases can the owner of the goods be said to suffer any damage by measures taken to extinguish fire. (Cf. No. 3 of the York-Antwerp Rules, 1890.)

(*k*) The cost of calling at a port of refuge on account of drift-ice is allowed as general average. (§ 188, No. 7.)

§ 191. The apportionment of damage resulting from general average is not precluded by the fact that the danger which occasioned the average was caused by the default of some person. No compensation in the general average shall, however, benefit such person in default. If the danger was caused by any fault or neglect, for which the owner of the ship is answerable in accordance with § 8 (l),^{*} he shall not be entitled to compensation in general average.

In case of error of judgment on the part of the master, or the person acting on his behalf, with regard to the nature of the danger or the measures taken to avoid it, the damage should nevertheless be apportioned as in general average; the owner of the ship, however, forfeits his right to compensation, unless the measure may be excused by the exceptional nature of the circumstances under which it was adopted. Any person thus forfeiting the right to compensation, or being compelled to contribute to the average, shall have the right to recover his loss from the person legally responsible for the damage.

§ 192. The apportionment of damage in general average is not precluded by the fact that the object of the sacrifice was not attained.

§ 193. Apportionment of damage in general average may also take place, although the ship or cargo is entirely sacrificed for the purpose, or although, subsequent to the average, only the ship or only the cargo is saved, whether entirely or in part (m).

§ 194. In case a sacrifice must be made, it is the duty of the master to see that no greater loss is incurred than is required for the purpose. When a jettison of cargo or of ship's appurtenances takes place, whatever is heavier or of less value shall first be thrown overboard, and the lighter and more valuable goods kept as long as possible, provided the danger admits of this being done.

If the master has by any fault caused more damage or loss than was necessary, the provisions of § 191 shall apply.

(l) § 8 reads as follows:—"The owner is responsible with ship and freight for damage through fault or neglect, in the service, of the master or any of the crew. This law also applies in cases where the damage is caused by some person who, at the request of the owner or master, may be working in the ship's service, without belonging to the crew. The owner shall have the right to recover his expenses from the person causing the damage."

(m) This rule is not in conformity with German law. According to the rule it is general average if the sacrifice from the beginning comprehended the whole ship or the whole cargo, and consequently intended not the *physical* preservation of *both* ship and cargo, but only the *physical* preservation of the ship and the saving of the value of the cargo, or *vice versa*; or if the sacrifice was not able to prevent the loss of the whole ship or the whole cargo. Another matter to be noticed is, that on account of § 216 an apportionment of the damage cannot take place, when all the objects which should contribute are lost, either in consequence of the danger to avoid which the sacrifice has been made, or on account of average incurred later on.

§ 195. Before taking any measure, which may lead to general average, the master shall, in case the danger so admits, call the best and most experienced of the crew to a council. A record of the council held shall, as soon as possible, be made in the log-book by the master, or shall otherwise be drawn up by him where no log-book is kept, in order to be produced when the protest is being extended. Everything of importance for the adjustment of the average shall be inserted in the said record, and especially a minute statement regarding the cause of the sacrifice, and also, if possible, a complete statement of the property sacrificed, or other information as to the extent of the damage (*n*).

§ 196. Damage to a ship or her appurtenances shall be valued by surveyors, appointed in the manner prescribed in § 41 (*o*), at the place where the repairs are executed if effected during the voyage, but otherwise, at the port where the voyage terminates. In the valuation, the estimated cost of repairing each separate injury shall be stated specifically, and whenever it is considered that damaged appurtenances ought to be replaced by new ones, the cost of the new as well as the value of the old shall also be stated.

Any damage due to the age of the ship or to the defect of the gear (*p*), or any other similar reason, should, in the valuation, be kept apart from the damage caused by the average.

§ 197. In calculating the damage to a ship or her appurtenances, the amount of the valuation shall be the amount allowed for the damage, when no repairs are done or the valuation is lower than the cost of the repairs executed; when it is higher, the actual costs of the repairs shall on the other hand be the amount allowed for the damage.

§ 198. When compensation is given for damage to an iron ship, the amount shall be made good in full for any damage to hull and to iron masts and spars, if the ship at the time of the average has not been five years afloat (*q*); should such damage occur later than five but before the expiration of ten years, one-sixth shall be deducted, new for old, and one-third if the ship has been afloat beyond that time. Any damage to a ship's engines shall be compensated in full if the engines have not been in use for three years when the damage

(*n*) In conformity with § 59 the master alone is responsible for any decision which he has come to after a general council of those on board.

(*o*) See *infra*, p. 708.

(*p*) The Danish and Norwegian Codes say: "Any damage due to age or decay."

(*q*) The Danish and Norwegian Codes add: "Reckoned from the date of the commencement of the first voyage."

occurs; if happening later, but before the engines have been six years in use, one-sixth shall be deducted; and if they have been in use for more than six years, one-third shall be deducted. Any damage to masts and spars of wood and to standing gear shall be made good in full if the ship has not been one year afloat, and damage to boilers (*r*) and any other damage shall also be paid in full if the ship has not been afloat half a year when the average took place; if any damage occurs later, one-third shall be deducted, with the exception, however, of anchors, which are compensated in full, and of cables, for which one-sixth only is to be deducted.

In case of a wooden ship the damage to the hull shall be compensated in full, if the ship has not been two years afloat when the average occurred; if the damage takes place at any subsequent time, one-third is to be deducted, new for old. Any other damage shall be compensated according to the rules regarding iron ships.

From the amount of compensation thus estimated there shall be deducted the value as found at the survey of the things replaced by new ones, or of their net proceeds if they have been sold by auction.

If the ship is to be metalled anew, the compensation is to be calculated in the following manner, *i.e.*, after the value as metal of the damaged sheathing has been deducted from the cost of remetalling the ship with the same material, having the same weight as the damaged plates when new, the remaining amount shall be made good with the following deductions, *i.e.*, for copper or yellow metal one-sixtieth, and for any other metal one-thirtieth for each full month of thirty days since the damaged metal was put on the ship. If copper or yellow metal has been on the ship for more than five years and any other metal for more than two years and a half, no compensation shall be made.

§ 199. If by general average the ship is either totally lost, or damaged to such an extent that she is declared unfit to be repaired (*s*), the amount of the compensation paid shall be the estimated value of the ship at the time the loss took place, with the deduction of the net value of whatever may have been saved.

§ 200. Compensation for goods sacrificed in general average shall be calculated at the current prices for such goods at the port of destination on the ship's arrival there, or, should the remainder of the cargo never arrive at such port, at the prices ruling at the place where the voyage terminates; freight, customs and other expenses, which the owner of the cargo may save, shall, however, be duly deducted. If the goods

(*r*) The words "and damage to boilers" are not in the Danish or Norwegian Code.

(*s*) See § 6, *infra*, p. 707.

have been sold at a port of distress and the estimated compensation is lower than the net proceeds of the sale less the freight saved, the latter amount shall be made good in general average.

If a current price cannot be fixed, the value shall be ascertained by experts appointed in the manner prescribed by § 41 (*t*).

§ 201. For goods damaged in general average the amount to be made good is the difference between the value of the goods in an undamaged state, as found in the manner prescribed by § 200, and the value of the goods in their damaged condition less the deductions prescribed in the same paragraph. If the goods have been sold before the adjustment of the average, the proceeds of the sale shall represent the latter value, which shall otherwise be decided by experts appointed in the manner prescribed by § 41 (*t*).

§ 202. If cargo, lost or damaged in general average, has previously diminished in value on account of particular average, or through deterioration, or for any other reason, or, if any goods damaged in general average have subsequently decreased in value owing to circumstances in no way connected with the average, an amount corresponding to such diminution shall be deducted from the amount of compensation.

The amount to be deducted shall be fixed by a valuation by experts appointed in the manner prescribed by § 41 (*t*). When such valuation is made, particular attention shall be paid to damage done on the same occasion, or by the same cause, to other goods of similar description, which have not been damaged in general average.

§ 203. In general average, no compensation shall be made for cargo, in respect of which no bill of lading has been issued, or regarding the loading of which no reliable information is obtainable, either by any statement in the manifest or cargo-book, or otherwise. The master, crew and passengers shall, however, be allowed compensation for clothing and travelling effects, when the loss thereof in the average is confirmed on oath (*u*).

§ 204. Freight for cargo lost in general average, or sold at a port of distress to procure funds for joint requirements, shall be compensated with the amount which would have been paid if the goods had

(*t*) There is no express reference to § 41 in the Danish or Norwegian Code.

(*u*) The regulations in this Article have been made on account of the necessity of controlling claims for the loss of goods when the goods said to have been sacrificed may actually not have been on board. Conf. § 190, No. 1. In the Norwegian and Danish Codes it is not stated that the proof of the loss of personal effects must be given on oath.

existed when the ship arrived at the port where the goods ought to have been delivered, or in case the voyage is discontinued, at the port of termination of the voyage. Any expense which the owner of the ship may have saved in consequence of the sacrifice or sale of the goods shall be deducted from the amount of compensation (*x*).

§ 205. If anything which has been damaged in general average is subsequently lost, or suffers additional damage in particular average, and it can be assumed with certainty that the loss would have been sustained, wholly or partially, in the latter average, had not the general average previously occurred, the damage shall either not be compensated in the general average, or else the amount of compensation shall be reduced so far as in each case it may be proved proper. The same rule shall apply if anything, lost in general average, would have been lost or damaged in a subsequent particular average, should the property still have remained on board (*y*).

§ 206. Any damage or loss which is to be referred partly to general, partly to particular average, and any expense incurred in the two averages jointly, shall be fairly divided between the two.

§ 207. The ship contributes to general average upon—

1. Her value on arrival at the port where ship and cargo separate, ascertained by a survey in accordance with § 41.
2. The amount of the damage to the ship allowed for compensation in general average, provided the said damage has not been repaired.

In case any improvement has been made to the ship subsequently to the average, or any repairs have been effected of damage not sustained in general average, the value of such improvement or repairs, as esti-

(*x*) The owner shall have compensation for his actual loss but no more; and if, in case the cargo had been delivered at the port of destination, he would have had to incur expenses which are now saved (as, for instance, costs of discharging, harbour or canal dues), his real loss is not the amount of the gross freight, but the gross freight less the expenses saved.

(*y*) This Article expresses the natural principle that whatever has been sacrificed shall not thereby be in a better situation than that which the sacrifice was intended to save. One must suppose that what is sacrificed would have shared the fate of that which is not sacrificed. Damage sustained by the cargo during a jettison through water coming into the hold is not contributed for, if the ship later on springs a leak and is filled with water, or if the cargo is lost in a later casualty. If a mast is cut away and the ship is afterwards stranded and becomes a wreck, only that value is allowed in general average which the mast would have had at the place of stranding as a part of the wreck. This Article, as its language shows, is not applicable to the expenses which the owner of the damaged object has incurred for repairing the general average damage before the particular average took place.

mated by surveyors, shall be deducted from the value of the ship ascertained by the survey (*z*).

§ 208. The cargo contributes to general average upon—

1. The value of all the goods which were on board at the time of the casualty, and still remain when cargo and ship separate, the said value to be ascertained for undamaged goods as provided in § 200 and for damaged goods in the manner stipulated by § 201 (*a*).
2. The amount due to any owner of cargo in compensation of goods sacrificed or damaged in general average during the voyage.
3. The amount which the owner of the ship is bound to pay to the owner of cargo in compensation of goods which during the voyage have been lost, damaged, or sold by the master for the requirements of the ship (*b*).

§ 209. The freight contributes to general average upon—

1. One half of the amount of freight earned when ship and cargo separate (*c*).

(*z*) The ship contributes to general average on her value as ascertained by a legal survey and not on her selling value when she has not been condemned (declared unfit to be repaired; see § 6, *infra*), and the sale has thus not been necessary. (Decisions of the Supreme Court of the 10th December, 1897, regarding S.S. *Manningham* and of the 13th July, 1903, regarding S.S. *Turret Age*.) The value fixed by the legal survey does not absolutely form the basis if it is proved to be too low. (Decision of the Supreme Court, 10th January, 1900, regarding S.S. *Norge*.) The valuation made on the arrival of the ship at the port where ship and cargo separated was accepted in preference to a valuation made elsewhere in connection with an accurate survey of the damage. (Decision of the Supreme Court, 7th April, 1902, regarding S.S. *Aberfoyle*.)

(*a*) If goods are undamaged and a special valuation has not been made, the invoice value is usually taken as the basis. Should damaged goods have been sold previous to the adjustment of the average, the contributory value may, in conformity with § 201, consist of the proceeds of the sale, even if the sale is not carried out by public auction.

(*b*) The Danish Code adds a reference to § 149.

(*c*) Owing to the difficulty of determining in every case with perfect exactness the amount of the expenses which the owner would have avoided by the discontinuance of the voyage, and of the freight which has been saved by the sacrifice, the contributory value of the freight has been fixed at one-half of the gross amount. There are no provisions as to the liability of freight in general average when the ship is let on time charter. A definite usage in this matter cannot be considered as existing. The adjusters generally make the freight contribute on one-half of the amount of the voyage freight, without always deciding how the contribution of the freight is to be apportioned between the owner and the time-charterer. The outlines of the Swedish law relating to the payment of freight are given above (p. 695). The opinion of the Courts is that disputes concerning the amount of the freight which has actually to be paid

2. One half of the amount of the compensation payable in general average for lost freight.

If no certain freight has been agreed upon, it shall be calculated according to the rules laid down in § 150 (*d*).

§ 210. If an advance of freight has been made, and the owner of the ship is under no obligation to repay it in case of misfortune, the said owner shall not be bound to contribute to general average in respect of the advance (*e*).

§ 211. In calculating the values upon which general average is to be apportioned in pursuance of §§ 207—210, deduction shall be made, not only of contributions to any subsequent general average, which has taken place during the voyage, but also of any expense incurred to save or preserve the property upon which the general average is apportioned, provided the said expense is not recoverable in the average (*f*).

§ 212. The following items do not contribute to general average:

1. Provisions, coals and other requisites for the working of the engines, and ammunition of war.
2. Wages of master and crew.
3. Clothing and travelling requisites of persons on board and whatever they carry about their persons.

If, however, any of the effects mentioned in No. 3 have been sacrificed or damaged in general average, the owner thereof shall participate in the payment of the average in proportion to the amount of compensation due to him (*g*).

§ 213. The adjustment and settlement of general average shall take place at the port where ship and cargo separate, or where the adjust-

cannot be finally decided in accordance with the rules concerning adjustment. (Decisions of the Supreme Court of the 5th May, 1896, regarding the sailing ship *Ingomar*; of the 10th January, 1900, regarding S.S. *Norge*, and of the 13th July, 1903, regarding S.S. *Turret Age*.)

(*d*) See *infra*, p. 712.

(*e*) As mentioned above (p. 695), any advance of freight for goods lost must, in conformity with § 151, be refunded, unless stipulations to the contrary have been made. For an advance of freight made without such obligation of refunding, the owner of cargo instead of the shipowner has to participate in the payment, and the advance contributes in proportion to its whole amount. According to usage the advance of freight is generally put in the adjustment as a special contributory subject, on account of the possibility of the interests being insured by different underwriters.

(*f*) This provision agrees with No. 17 of the York-Antwerp Rules, 1890.

(*g*) See also § 179, *infra*, p. 715, which exempts loans on bottomry from contribution.

ment of averages is generally made for such port and in pursuance to the law of the place (*h*).

Adjustments of averages in this country are made by adjusters specially appointed for the purpose (*Dispachör*) (*i*).

§ 214. It is the duty of the master, without any delay, to cause the adjustment of the average to be made. If any person interested in the average desires such adjustment, he has the right to demand it (*k*).

Every person concerned in the average shall be obliged to deliver to the adjuster all documents which the latter may consider necessary for the adjustment and apportionment, and otherwise supply him with information.

It shall be the duty of the adjuster, whenever a request for an adjustment of average is made, as soon as possible to summon by notice, to be inserted in the Official Gazette and in a local newspaper, all persons who participate in the average to state in writing, within a certain prescribed short time, whatever they may deem expedient for the maintenance of their rights, and to send to him any document to which they wish to refer. If any of the documents delivered are found incomplete the adjuster should, as soon as possible, request the respective party to furnish the necessary information. When the time prescribed in the notice expires, or, if no complete documents have been delivered by the time appointed, when complete delivery has taken place, it shall be the duty of the adjuster to have the adjustment of the average drawn up in duplicate within two months, and on the day announced by notice posted up in the town court, and by

(*h*) The words "or where . . . such port," are not in the Danish or Norwegian Code.

(*i*) The Danish and Norwegian Codes add: "Any disputes as to the correctness of average adjustments are settled by the Courts."

Adjusters appointed by his Swedish Majesty are at present found in the towns of Stockholm, Gothenburg, Hernösand and Malmö. If an adjustment (*dispatche*) is not appealed against within a certain time (thirty days after the decision of the adjuster is given) at the town court in the town where the adjustment was issued, the adjustment is binding on the parties as a lawfully enacted determination of the Court. An average adjustment is consequently not in Sweden, as in several other countries, only a declaration, founded on special knowledge of the subject, but not absolutely binding on the parties. An adjustment in Sweden possesses real legal validity. The Swedish adjuster thus occupies to some extent the position of a judge. Nevertheless, no special qualifications are required for the post of adjuster, though all the adjusters in practice at the present time (1910) have passed an examination in law.

§§ 326, 329 and 330 contain certain provisions for the procedure to be followed in case a party interested wishes to contest an adjustment; and every adjustment, not appealed against in the manner prescribed, is declared by § 329 to be valid.

(*k*) This sentence is not in the Danish or Norwegian Code.

advertisement in the Official Gazette and in one of the local newspapers; the said adjustment to be provided with an indorsement indicating the limit of time within which any person dissatisfied with the adjustment can have the case brought before the Courts in order to preserve his right of pleading. Of the two copies one shall be delivered to the person who has requested the adjustment, the other shall be kept by the adjuster for exhibition to the other persons interested in the average (*l*).

§ 215. If any goods, mentioned in an average adjustment as lost in general average, are subsequently found, or if any damage entered in the adjustment as general average is afterwards paid by the person duly bound to make compensation therefor, the adjustment shall be corrected by means of a supplementary statement.

The drawing up of the adjustment should, however, not be delayed simply on account of there being a chance of recovering any goods lost, or receiving compensation for damage.

§ 216. For any average contribution assessed on property, the owner of that property shall only be responsible with the property but not personally (*m*).

§ 217. No ship, liable to pay average contribution, may leave the port where ship and cargo separate, nor may any goods, liable to pay a similar contribution, be taken possession of by their owner, before the contribution has been paid, or security given in case the amount of the contribution has not, by that time, been fixed (*n*).

(*l*) The whole of this paragraph is omitted in the Danish and Norwegian Codes. The notification here stipulated is intended to give all those whose rights it concerns an opportunity of pleading before the adjuster and of proving their rights, and also of appealing against the adjustment in due time. In conformity with § 264, any dispute regarding the liability of the underwriters under a contract of marine insurance must also be decided, in the first instance, by an adjuster. The declaration (*dispatche*) of the adjuster is in this case termed a "particular" adjustment, as distinct from a "general" adjustment concerning the apportionment of general average. The fee for a general adjustment, as fixed by Royal Ordinance of the 19th January, 1883, is a certain percentage of the values on which the common damage and cost are apportioned, with the addition, when the ship in question has been loaded with general cargo and the number of bills of lading or freight notes exceed forty, of ten Swedish kronor for each bill of lading or freight note above the number mentioned. For a particular adjustment the amount of the fee is the percentage fixed for a general adjustment and calculated on the amount of insurance. The fee for an adjustment must never exceed 2,000 Swedish kronor.

(*m*) Claims for average contributions have a lien on ship, freight and cargo on board under § 268, No. 3, and § 276, No. 2.

(*n*) Under § 155 and § 156, paragraph 1, if the average contribution, for which goods are liable, is not paid or deposited, or security given therefor, the master has

§ 218. Every expense or damage caused by any casualty during a voyage, which is neither general average nor is to be apportioned on the same principles as general average in accordance with § 161, shall be borne as particular average by the property which has suffered the damage or incurred the expense (*o*).

If any expenses, which are chargeable as particular average, have been incurred jointly for ship and cargo, or any certain portion of the cargo, or for portions of the cargo belonging to different owners, the said costs shall be fairly divided between the properties for which they have been incurred, in accordance with the rules laid down for general average. The expense of saving cargo shall be divided between such cargo and the freight payable thereon in proportion to their respective values.

If any person, participating in such average, should so require, the adjustment and distribution of the average shall be made by the proper adjuster.

FROM CHAPTER I.—SHIPS.

§ 6. A ship which has sustained damage shall be considered unfit for repairs, not only when repairs are found to be impossible or when the repairs can only be done at another place to which the vessel cannot be conveyed, but also in the case of the ship not being worth repairing. Should the question arise whether the ship, after sustaining damage, should be considered fit for repairs or not, a report must be made by surveyors appointed in the manner prescribed in § 41 (*p*).

FROM CHAPTER III.—MASTERS.

§ 32. During the voyage, the master shall do everything in his power to keep the ship in a seaworthy condition. If the ship has stranded or otherwise met with a casualty, whereby damage may be supposed to have been sustained, it shall be the duty of the master immediately

the right to discharge the goods and store them in safety for account of the respective receivers of the cargo. Under § 157 the master, after the goods liable to contribute to general average have been stored, has the right to sell by public auction as much of the goods as may be sufficient to pay the claims.

(*o*) Particular average can only be defined negatively—average which is not general is particular. The Maritime Law (§ 161) prescribes that if a ship is delayed at the place of loading after the cargo has been loaded, or in any port at which it has called during the voyage, by a hindrance mentioned in § 159 (outbreak of war, embargo, blockade, &c.), the expenses of the delay (until the contract of affreightment is annulled) are to be divided between the ship, the freight and the cargo, according to the rules of general average.

(*p*) See *infra*, p. 708.

on the arrival of the ship at any port where a survey can be made, to cause such survey to be instituted.

§ 41. Should the ship, from any accident during the voyage, have suffered damage requiring extensive repairs or causing considerable detention, the master shall cause a survey of the ship to be instituted. The surveyors shall not only examine and appraise the damage sustained through the accident, and the ship in her damaged condition, but also recommend what means should be adopted for the proper repair of the damage, and calculate the necessary costs.

Should repairs be effected, a new survey shall, on the completion of the repairs, be held in order to ascertain if the ship is in such a condition that it can proceed on the intended voyage.

Should the cargo have suffered considerable damage from any casualty, bad weather or similar occurrence during the voyage (*o*), or should there be reason to suppose that the condition of the cargo is such that special measures for its preservation are required, or should the discharge of the cargo be found necessary on account of damage to the ship, then the master shall cause a survey of the cargo to be held. Should the cargo be found damaged, the surveyors shall report their opinion as to the cause of the damage and suggest what steps ought to be taken.

Surveyors are appointed by the magistrate, or where the ship is lying beyond the jurisdiction of a town by the magistrates of the nearest town or by the Crown bailiff (=kronofogde) of the district (*p*). When the ship is in a foreign port, the master shall apply for the appointment of surveyors to the authority competent so to appoint according to the laws and customs of the port where the survey is to take place, or to the Swedish Consul (*q*). If the ship is at a port where it is not customary for surveyors to be appointed by a public authority, the master shall obtain the opinion of experts.

§ 42. Should there be reason to suppose that the cargo has been damaged during a voyage, the master ought to have the goods surveyed by surveyors called in for the purpose previous to the delivery of the goods to the consignees of the cargo, as mentioned in § 332, sect. 2. If the question can arise whether the damage has been caused through faults in the stowing of the cargo, or the caulking of the hatchways, or through any other similar fault, the master shall require

(*o*) The words "from any casualty . . . voyage," are omitted in the Danish and Norwegian Codes.

(*p*) There is no equivalent sentence in § 41 of the Danish or Norwegian Code.

(*q*) § 41 of the Danish Code does not provide for the alternative application to the Consul.

the presence of the surveyors at the opening of the hatchways and the examination of the goods (*r*).

§ 43. When the ship is in distress the master is bound to do everything in his power to save and protect the vessel, and shall not abandon her as long as there is hope of saving her. Should safety be found impossible, and the danger be so threatening that the master is obliged to abandon the ship, it is particularly his duty to see that the logbook and the ship's documents are saved, and to take measures for the salvage of ship and cargo, for which purpose he ought to summon necessary assistance.

Should salvage take place, the master shall conduct the salvage operations, unless it is prohibited by the laws of the place or the salvage contract prevents him from so doing. The master shall either himself or through the mate carefully note down everything salvaged and also take a note both of the number of men assisting in the salvage and the carriage of the goods to the storage place, and of all the work done; and the master shall moreover examine, and under his signature attest the correctness of all the accounts of expenses incurred in the salvage.

The master shall, as soon as possible, cause a survey to be instituted in the manner prescribed in § 41 (*s*) for the examination of the ship and of the goods salvaged, and shall see that the latter are properly taken care of.

§ 49. If money be wanted when the ship is away from the port to which she belongs, for any of the purposes mentioned in § 48 (*t*), the master shall have the right to procure the necessary means by loan or by selling part or parts of what belongs to the owners, or of the cargo. In case the master has borrowed money or effected any sale without valid reason, or has raised a larger sum, or sold more than required for the occasion, the validity of the rights of the lender or purchaser will thereby in no way be effected, provided the loan has been raised or the sale effected under such circumstances that the lender or purchaser must be supposed to have acted *bonâ fide*.

§ 54. In matters relating to a third party, the master shall, in his capacity of master, have power to enter into agreements on behalf

(*r*) In the Danish and Norwegian Codes the reference to § 332 is omitted; and in the latter it is further provided that "the surveyors shall in Norway be appointed by the byfoged (judge of the municipal Court) or the sheriff; in foreign countries the rules of the preceding article shall apply."

(*s*) The Danish and Norwegian Codes say: "Instituted according to law."

(*t*) *I.e.*, for purposes connected with the completion of the voyage, such as the outfit, repairs or provisioning of the ship.

of the owner of the cargo during the voyage as regards the preservation or further conveyance of the cargo, as also to sue in cases affecting the cargo. Should money be required for any of the last mentioned purposes, the master shall have the power to procure the necessary means by loan or by selling cargo, and in such cases the provisions of § 49 regarding loans and sales for the requirements of the ship shall also apply (*u*).

§ 55. Should the cargo, on being surveyed in conformity with § 41, be found to be in such a state that it cannot be kept without risk of deterioration, the master shall have the right to sell the same. If the ship has been lost or been declared unfit to be repaired, the sale may take place, although the property could be kept without danger of deterioration, should the survey prove that the cost of its preservation and conveyance to the port of destination would be excessive.

§ 57. Before raising a loan or selling part of the cargo for the requirements of the cargo, or otherwise adopting any special measure on behalf of the owner of the cargo, the master shall, when practicable, ask for instructions from the owner of the cargo or his appointed agent. If the ship has been lost or declared unfit to be repaired, it is the duty of the master, when the owner of the cargo has no agent on the spot, or his instructions cannot be awaited, according to circumstances either to forward the goods by the cheapest mode of conveyance to the port of destination, or to cause the same to be stored or sold.

The sale of a cargo should if possible be effected by public auction.

FROM CHAPTER V.—AFFREIGHTMENT.

§ 109. Agreements respecting the carriage of goods shall be made by a written instrument (charterparty) should any of the parties so desire.

§ 110. The chartering of a whole vessel does not, except by special agreement, include the open decks nor the cabins or other spaces intended for the accommodation of the crew, or for ship's stores, provisions, fuel or other requisites necessary for the voyage.

Except with the consent of the charterer, no goods shall be carried for any other person on deck or in any of the above-mentioned spaces. Should goods nevertheless be so carried, the owners of the ship must

(*u*) The Danish and Norwegian Codes add: "For the engagements thus entered into by the master on account of the cargo-owner, the latter is only responsible with the goods loaded."

pay freight to the charterer (*x*), together with such compensation for the damage and loss sustained on account of the carriage of the goods, as arbitrators may decide to be right (*y*).

§ 113. Except with the consent of the charterer, his goods shall not be forwarded in another ship than the one chartered, unless any of the emergencies referred to in §§ 159 and 160 should cause such action to be adopted. Should such forwarding nevertheless take place, the charterer shall be entitled to such compensation for any damage and loss sustained thereby as arbitrators may find to be due (*z*).

§ 117. Except with the consent of the shipper, his goods are not to be loaded on deck or in any of the ship's boats, nor hung over the side.

§ 142. The owner of the ship shall be responsible for all loss, damage or diminution of goods, after having received the goods for loading and previous to the discharge thereof, unless the loss, damage or diminution may be supposed to have been caused by sea perils, seizure by enemies, or any other accident beyond the control of the master and crew; or else, by defective or insufficient packing, or by the nature of the cargo itself which made it liable to be easily deteriorated or destroyed, as for instance in the case of the heating and combustion of grain cargoes, the leaking or evaporation of liquids, or the death of animals.

Should the cause of the damage sustained be the defective condition of the ship at the commencement of the voyage, the owners of the ship shall not be liable to pay compensation, when the defect was not discoverable in spite of all care being taken.

§ 143. A statement shall be made to the master of goods loaded, which require special care and attention, and such requirement shall be conspicuously marked on the goods; failing this, compensation cannot be claimed for damage unavoidable in the absence of such care as aforesaid. No compensation is given for monies, securities or valuables, unless they have been declared as such, and the value stated.

§ 149. When the owner has, in accordance with § 142, to make good any damage, deficiency or diminution of the goods, or has to pay compensation for goods sold for the benefit of the ship, in accordance with § 49, the amount of the compensation shall be fixed in conformity with the rules laid down in §§ 200 and 201 respecting compensation for goods in general average.

(*x*) "At current rates": Danish and Norwegian Codes.

(*y*) There is no mention of arbitration in the Danish and Norwegian Codes.

(*z*) See preceding note.

§ 150. If the master has taken goods on board without having agreed upon the amount of freight, freight shall be paid at the rate current at the port of loading at the time of loading. Should, in case of an agreement having been made, more goods be loaded than agreed upon, freight shall be paid for such (excess) goods at the same rate as for the goods for which the agreement has been made.

§ 151. Freight shall not be paid for goods which do not exist at the end of the voyage, unless they have disappeared in consequence of their perishable nature (a), or in consequence of bad packing, or otherwise through the shipper's fault, or have been sold during the voyage for account of their owner.

Should freight have been paid in advance for goods for which the charterer is not bound to pay any freight according to the preceding stipulation, such advance must be refunded, unless a special agreement has been made to the contrary.

§ 152. Receptacles containing liquid goods may be abandoned by their owner in lieu of freight when more than half the contents are missing. This right, which applies to each separate vessel, cannot be claimed after the vessel has been delivered to the consignee, and shall not hold good if the receptacles were defective or badly packed when loaded, and the master has, in the manner prescribed in § 147, made a note to that effect on the bill of lading in case such has been issued.

§ 153. The owner of the ship shall pay all shipping dues, towage, quarantine and other similar expenses connected with the voyage from the loading port to the port of discharge, and consequently, for such charges, compensation cannot be claimed from the charterer.

§ 154. In receiving the goods, the consignee incurs the liability to pay freight, and whatsoever the owner of the ship shall have the right to claim from the charterer according to the bill of lading or other document, on the strength of which the goods have been received.

§ 155. The master shall not be obliged to deliver the goods before the consignee has either settled the claims mentioned in § 154 and paid compensation for demurrage and any other delay in the discharge, as well as any average contribution and other claim chargeable on the goods, or else deposited publicly, or in the hands of a private person to be approved by the master, the amount claimed, which the

(a) See *ante*, § 142.

master is entitled to draw out on delivery of the goods (*b*). For average contribution, the amount of which has not been definitely fixed, goods shall not be retained, provided the consignee of the cargo gives security for the amount.

The above enactment shall also apply where the discharge of goods takes place at the port of loading or during the voyage.

§ 156. Should the consignee of the cargo refuse to receive it, or should he be unknown or impossible to find, it is the duty of the master, when practicable, immediately to inform the shipper of the fact. If no person entitled to receive the cargo presents himself in such time as to allow the discharge to be finished before the expiration of the discharging time, or, should the charterparty relate to general cargo, to take place at the time appointed by the master (*c*), the latter shall cause the goods to be discharged and safely stored for account of the respective consignees of the cargo. If the consignee of the cargo fails to fulfil the duties incumbent upon him in order to obtain possession of the goods, according to § 155, or otherwise detains the ship whilst being discharged, so that the discharge cannot take place in proper time, the master shall have the right to discharge and store the goods in the manner aforesaid.

In case the goods are stored, the master shall inform the consignee of the cargo of the measure taken, if the latter be known and present at the place of discharge; otherwise notice shall be given in the manner prescribed in § 118 for similar cases (*d*). Should the master be detained for the storing of the goods, or otherwise for the discharge, over and above the time allowed for discharging, without any fault or neglect on his part, the owner of the ship shall be entitled to compensation for damage and loss, the amount of the compensation in case of dispute to be decided by arbitration but in no case to be fixed at a lower figure than for days on demurrage.

§ 157. If goods are stored for any of the reasons referred to in §§ 140 (*e*) or 156, the master shall have the right to sell by public auction as much of the goods as may be sufficient to cover the claims mentioned in § 155, besides custom duties and other expenses.

(*b*) The Danish and Norwegian Codes add a proviso that in case of dispute the consignee has the right to protect himself by arrest or prohibition.

(*c*) The Danish and Norwegian Codes add: "According to § 138," which article obliges the consignees of general cargo to take their goods away when the master gives them notice to do so.

(*d*) *I.e.*, by publication in a local newspaper, or in the customary manner at the place.

(*e*) *I.e.*, when the same goods are claimed by more than one bill of lading holder.

§ 160. In case the ship is lost during the voyage, or declared unfit to be repaired, the charterparty shall cease to be in force. It shall be the master's duty, however, for account of the owners of the cargo, to take such measures regarding the cargo as are enjoined in § 57.

In such cases the freight is to be calculated for the distance sailed in proportion to the full voyage to which the charter refers; due allowance, however, being made for the time required for the voyage and the particular difficulties and expense connected therewith, in comparison with that of the whole voyage (Distancefreight). If the parties cannot agree as to the freight payable, the amount shall be fixed by arbitration.

If the owner of the cargo wishes to surrender the goods remaining, in lieu of freight, he shall be at liberty to do so.

§ 161. Should such hindrance as is mentioned in § 159 (*f*) occur after the ship has left the port at which the voyage commenced, each party shall nevertheless be at liberty to annul the charterparty, but the charterer shall pay distance freight for the portion of the voyage sailed at the time of the annulling of the charter, as provided in § 160. If the agreement is annulled, it shall be the duty of the master, for account of the owner of the cargo, to take such steps respecting the cargo as are prescribed in § 57.

If the ship is delayed at the port of loading or in any port of call during the voyage by any such hindrance subsequent to the loading of the cargo, the expenses of the detention shall be divided between ship, cargo and freight according to the rules of general average. When the agreement is annulled such apportionment shall, however, not be made as regards expenses subsequently incurred.

§ 162. If the contract is annulled on account of such hindrance as is referred to in § 159 (*g*), and should, in consequence thereof, the discharge of cargo have to take place, any expense in connection with the discharge shall be borne by the charterer in case the hindrance affects solely the cargo; should the hindrance affect the ship also, or the ship alone, or should the master have made use of the right to annul the charterparty, conferred upon him by the same section (*h*), the expenses of the discharge shall be borne in accordance with the rules laid down in § 136 (*i*).

(*f*) *I.e.*, in consequence of the outbreak of war, embargo, blockade, prohibition of exportation or importation, &c.

(*g*) See note (*f*), *supra*.

(*h*) *I.e.*, the right to annul all the contracts, when those yielding half of the full freight are annulled.

(*i*) *I.e.*, the master must deliver the goods alongside, and the other expenses of the discharge are borne by the consignee.

§ 163. If the ship for any reason be delayed at the loading port, or in any port of call during the voyage, and the delay is likely to become of long duration, the charterer shall have the right, provisionally, to discharge the goods belonging to him, provided he deposits security for the payment of the claims referred to in § 155, in the event of the goods not being reloaded in proper time at the request of the master. If the ship is chartered by several persons, the discharge of the goods of one charterer may not take place except with the consent of the other charterers, should thereby any damage or loss be sustained by them.

§ 164. If the ship has had to call at a port of distress, having sustained damage, and a survey of the cargo, held in the manner prescribed in § 41, proves that the whole or a considerable portion of the cargo is liable to deterioration on account of the delay incurred for repairing the ship, the charterer shall have the right to annul the agreement in consideration of the payment of distance freight, as provided in § 160; should the ship, however, be chartered by several persons, the right aforesaid cannot be exercised if any of the other charterers insist on the continuation of the voyage.

FROM CHAPTER VI.—BOTTOMRY.

§ 175. The master may pledge ship, freight, and cargo, jointly or separately, as security for a bottomry loan. Should the loan be raised to pay expenses which solely concern the cargo, the cargo alone should be pledged. For any other expenses, the cargo should not be pledged except together with ship and freight. If ship and cargo are pledged jointly, the freight shall also be considered included in the pledge unless specially excepted.

Should anything be pledged as security for expenses which do not concern the security pledged, and the said security be sold to pay the claim on the strength of such pledging, the owner of the property pledged shall have the right to recover the same from the property on behalf of which the expense was actually incurred, with the same rights as would have been held by the lender should the latter property have been pledged as security.

§ 179. No deduction is made from the bottomry debt for contributions to general average chargeable on the property pledged. Should the property pledged thereby prove insufficient to repay the loan, the lender must bear the loss.

FROM CHAPTER IX.—SALVAGE COMPENSATION.

§ 224. Any person salvaging any wrecked or distressed ship, or her cargo, or anything which has belonged to any such ship or her cargo,

as well as everyone assisting in any such salvage, shall have the right to receive salvage compensation out of the salvaged property. If the parties cannot agree as to the amount of the salvage compensation, the Court shall decide.

§ 225. When deciding the amount of the salvage compensation, the particular attention of the Court shall be given to the following circumstances, *i.e.* :

1. Whether the property salvaged had been exposed to imminent danger; whether the ship was abandoned by the crew; whether the crew assisted in the salvage, or whether the salvage was otherwise rendered easier by employing the vessel's own resources;
2. The danger to which the salvors and their material were exposed, and the damage which the salvors may have suffered to life, health or property;
3. The skill and energy by which the salvage was carried out, and the time and work expended;
4. The number of the crew assisting in the salvage, the value of the material used, and the expense incurred by the salvors themselves in the salvage operations;
5. The value of the property salvaged.

§ 226. The salvage compensation should generally not be fixed higher than one-third of the value of the property salvaged, after deduction of custom dues and other expenses chargeable on the property, as well as any expenses for the preservation, valuation and sale of the said property. If the salvaged property is of small value, or if unusual trouble or danger was incurred in the salvage, the compensation may, however, be fixed at a higher amount.

Compensation for bringing the salvaged property into safety, and for the use of boats or other material for such purpose, is also to be included in the salvage compensation.

§ 228. If the salvors dispute between themselves regarding the division of the salvage compensation, the Court shall decide, taking the circumstances mentioned in § 225 into consideration.

If a ship salvages anything during a voyage, the owners shall receive two-thirds of the salvage compensation, if the ship is a steamer, otherwise one-half, the damage done to ship or cargo in the salvage having, however, first been paid from the said compensation, whereupon the remainder shall be divided equally between the master and the crew; the portion due to the crew shall be divided in proportion to their respective wages. Agreements awarding to the master or crew a smaller portion of the salvage compensation than may be earned by a ship, than mentioned above, shall be null and void, unless the ship is specially

equipped for salvage operations or the agreement refers to the carrying out of any special salvage enterprise.

§ 229. No ship salvaged shall leave the place to which it has been brought subsequently to the salvage, nor shall any salvaged cargo be removed by its owner, before the salvage compensation has been paid or security deposited, except with the consent of the salvors.

FROM CHAPTER X.—INSURANCE.

§ 250. If an adjustment of general average has been made at the proper place in accordance with the laws of such place, the underwriters shall be bound, not only to compensate the proportion to be borne by the security, interest, article or other object of insurance, but also any proportion of damage in connection therewith, which is to be paid by any other participator in the average, provided the party insured proves that he has not been able to recover such proportion. The aforesaid liability is also incurred by the underwriters even if the security, interest, article or other object of insurance should have been appraised higher in the average adjustment than the insurance value.

If no adjustment of average has taken place, and such omission is not the fault of the party insured, the said party shall have the right to claim compensation for the full damage in accordance with the terms of the contract of insurance.

§ 251. If the average is adjusted by the proper person at the proper place, the underwriters cannot plead against the party insured that any person, contrary to the laws in force at the place of adjustment, has been favoured at the expense of the party insured, unless the latter party is himself to blame that his rights have not been properly looked after; the party insured shall, however, be obliged to give up his rights against the person thus favoured to the underwriters.

APPENDIX V

LAW OF THE UNITED STATES OF AMERICA.

In the last edition of this work, the learned author set forth a statement of the law of the United States, founded, in the main, upon information derived from Mr. Gourlie's valuable book, published in 1881. During the thirty years which have elapsed since this date, there have been many important decisions in the Courts of the United States which render a full reconsideration of the subject necessary. For this revision the editors have been fortunate in obtaining the valuable assistance of Mr. W. R. Coc, a member of the well-known firm of Messrs. Johnson and Higgins, average adjusters, &c., of New York, and the following statement of the law and practice of the United States on the subject of General Average has been prepared by him.

GENERAL PRINCIPLES.

Similarity of
origin.

The law of general average in the United States closely parallels in its growth that of Great Britain. It should be noted at the outset, however, that as the first decision mentioning the term general average in England was in 1799 (*a*), the United States had then become a separate nation, and the common law, which was taken over by us at the Declaration of Independence, become part of our fundamental law, so that the recorded law of general average had its beginning in the United States at a time when English decisions could not serve as precedents. Having been derived from the same continental sources and expounded by judges schooled alike in the common law, the development was and has been to all intents and purposes along the same lines, with a few divergences due to local custom, to the attitude toward common carriers and insurers, to statutes relating to carriage by sea, and to differences in judicial interpretation of the law.

(*a*) *Ante*, p. 18.

Cases involving questions of general average may come under the jurisdiction of either the District Courts of the United States (Federal Courts), or of the State Courts. The District Courts, however, have exclusive jurisdiction in Admiralty (*b*), and proceedings *in rem* against vessels and in salvage cases are necessarily brought before them. In the United States a lien is given for general average, and as the Admiralty Court by its process *in rem* affords the most convenient remedy against the ship, it has become the Court before which nearly all the cases involving general average are now heard. Proceedings against cargo owners for contribution can be had, and in former years were most frequently brought, before the State Courts, but the Federal Courts have become, by a process of selection, the favoured tribunal for cases involving general average, even where the State Courts are open to the parties. It may be pointed out, however, that in this country, as in England, the practice of adjusters is so well established and so generally recognized to-day that litigation of general average questions has become very infrequent; and cases that come before the Courts usually involve questions of fact, or some complicated question of law, where the sacrifice is made necessary by negligence or unseaworthiness.

The first case of general average contained in any American report is *Brown v. Cornwell* (*c*), at a trial Court in Connecticut in the year 1773, in which jettison of horses from on deck was allowed in general average.

The first reported case of any moment in our Courts was *Campbell v. The Alknomac* (*d*), in the United States District Court for South Carolina in 1798. This case is important as marking the beginning of the American rule as to port of refuge expenses. A vessel was on a voyage from Liverpool to Charleston, and put into Norfolk in distress. In allowing contribution for the expenses the Court said:

“All necessary charges of unloading, reloading, anchorage, pilotage, storage, wharfage, and other such expenses incurred at Norfolk, together with wages and victualling of the crew from the day of consultation on board at sea as to seeking a port, till the day of her leaving Norfolk to return here, must be brought into general average.”

(*b*) This jurisdiction was conferred by the Constitution, but covered only cases arising on the sea and on tide waters; in 1845, by an Act of Congress, the jurisdiction was extended to the Great Lakes and connecting waters. See *The Gansee Chief*, 12 How. 443; *Allen v. Newberry*, 21 How. 244.

(*c*) 1 Root (Conn.), 60.

(*d*) Bee, 124; Fed. Cas. 2350.

Another important early case was *Maggrath v. Church* (e), in the Supreme Court of New York, the judgment in which was delivered by Chancellor Kent, author of Kent's Commentaries.

The first case, however, in which the principles of general average were exhaustively considered was *Caze v. Reilly* (f), decided in the United States Circuit Court of Pennsylvania in 1814. It is interesting to note that in this case practically all the citations by counsel and the Court were from the old continental text writers, ordonnances and laws, and that in this and the *Maggrath* case *Birkley v. Presgrave* (g) was cited. The judgment in *Caze v. Reilly* has been referred to with approval on several occasions by the United States Supreme Court, and as that judgment was based so largely on the continental authorities, it is safe to say that our law has been much influenced thereby.

As Lowndes has noted in his Fourth Edition, the decisions of the Courts in either country have been regarded with deference in the other, and the tendency of the two, especially of late, has been towards uniformity rather than separation. Lowndes remarks (h) that the American judges have been the first to arrive at conclusions which have afterwards been adopted in England; as, for instance, with regard to the means taken to extinguish a fire, and in allowing contribution when the vessel is in ballast or where vessel and cargo are of the same ownership.

It should be observed that the York-Antwerp Rules are embodied nowadays in nearly all contracts of affreightment for foreign voyages, and for many of the longer voyages in the coasting trade. It is interesting to note that in an important case the United States Supreme Court has stated that the York-Antwerp Rules relate only to the subjects of contribution in general average, and do not deal with the underlying principles, and that the English Courts hold the same view (i).

Definition of
general
average.

In the matter of definition, no American judge has succeeded in improving upon the compact and comprehensive definition of general average given by Lawrence, J., in *Birkley v. Presgrave*. Most of the early attempts of our judges to define the subject deal only with sacrifices and fail to include expenses.

The most comprehensive treatment of the theory and history of general average will be found in *Caze v. Reilly*, already cited, and

(e) 1 Caines, 195 (1803).

(f) 3 Wash. Cir. Ct. 298; Fed. Cas. 2538.

(g) 1 East, 220.

(h) Fourth Edition, 605.

(i) *Ralli v. Troop*, 157 U. S., at p. 412 (1894); *Greenshields v. Stephens*, 13 Com. Cas. 91; [1908] A. C. 431.

in the opinion of Story, J., in *Columbian Ins. Co. v. Ashby* (*k*), in the United States Supreme Court in 1839.

In the former case, Washington, J., said:

“The object is to incur a partial loss and to risk a minor or contingent danger to avoid the more certain loss of all.”

In the latter case, Story, J., states the requirements for contribution as follows:

“First: That the ship and cargo should be placed in a common, imminent peril.

Secondly: That there should be a voluntary sacrifice of property to avert that peril.

Thirdly: That by that sacrifice the safety of the other property should be presently and successfully attained.”

As to the basis of general average, the same eminent jurist remarks:

“The principle on which this contribution is founded is not the result of a contract, but has its origin in the plain dictates of natural law” (*l*).

In *Sturgess v. Cary* (*m*), Curtis, J., says:

“The fact that the peril impending over the ship and cargo would have destroyed both if not averted, so far from being inconsistent with a claim of this kind, is a necessary prerequisite to the voluntary act of the master; and what is denominated a sacrifice means, not that its subject was destroyed, or even subjected to greater danger than it was already in, but that it was selected to suffer alone and thus avert the common peril.”

And in another case arising from the same accident (*n*), the same judge said:

“It depends upon a principle of natural justice that they who have received a common benefit from the sacrifice voluntarily made by one engaged in a common adventure should unite to make good the loss which that sacrifice occasioned.”

In the case of the *Star of Hope* (*o*), Clifford, J., says:

“General average contribution is defined to be a contribution by all the parties in a sea adventure to make

(*k*) 13 Pet. 331.

(*l*) Story, Equity Jurisdiction, p. 490.

(*m*) 2 Curt. 59; Fed. Cas. 13572.

(*n*) *Sturgis v. Cary*, 2 Curt. 382; Fed. Cas. 13573.

(*o*) 9 Wall. 203 (U. S. Sup. Ct.).

good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to general average are usually divided into two great classes: (1) Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing. (2) Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.

“Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure.

“Where expenses are incurred or sacrifices made on account of the ship, freight and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests, but in order to constitute a basis for such a claim it must appear that the expenses or sacrifices were occasioned by an apparently imminent peril; that they were of an extraordinary character; that they were voluntarily made with a view to the general safety; and that they accomplished or aided at least in the accomplishment of that purpose.

“Authorities may be found which attempt to qualify this rule, and assert that where the situation of the ship was such that the whole adventure would certainly and unavoidably have been lost if the sacrifice in question had not been made, the party making it cannot claim to be compensated by the other interests, because it is said that a thing cannot be regarded as having been sacrificed which had already ceased to have any value, but the correctness of the position cannot be admitted unless it appears that the thing itself for which contribution is claimed was so situated that it could not possibly have been saved, and that its sacrifice did not contribute to the safety of the crew, ship, or cargo. Sacrifices, where there is no peril,

present no claim for contribution, but the greater and more imminent the peril the more meritorious the claim for such contribution, if the sacrifice was voluntary and contributed to save the associated interests from the impending danger to which same were exposed.

"Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice. Much is deferred in such an emergency to the judgment and decision of the master; but the authorities, everywhere, agree that three things must concur in order to constitute a valid claim for general average contribution; First, there must be a common danger to which the ship, cargo and crew were all exposed, and that danger must be imminent and apparently inevitable, except by incurring a loss of a portion of the associated interest to save the remainder. Secondly, there must be the voluntary sacrifice of a part for the benefit of the whole, as for example a voluntary jettison or casting away of some portion of the associated interests for the purpose of avoiding the common peril, or a voluntary transfer of the common peril from the whole to a particular portion of those interests. Thirdly, the attempt so made to avoid the common peril to which all those interests were exposed must be to some practical extent successful, for if nothing is saved there cannot be any such contribution in any case.

"Equity requires, says Emerigon, that in these cases those whose effects have been preserved by the loss of the merchandise of others shall contribute to this damage, and commercial policy as well as equity favours the principle of contribution, as it encourages the owner, if present, to consent that his property, or some portion of it, may be cast away or exposed to peculiar and special danger to save the associated interests and the lives of those on board from impending destruction; and if not present, the moral tendency of the well-known commercial usage is to induce the master to exercise an independent judgment in the emergency for the benefit of all concerned."

The above definition, or exposition, it will be seen, includes extraordinary expenses incurred for the joint benefit of ship and cargo, or with a view to the general safety.

Consultation of the master with the officers and crew is not neces- Authority for sacrifice.

sary before making the sacrifice (oo). Our Courts are reluctant to question the judgment of the master.

The following remarks of Clifford, J., in the *Star of Hope*, *supra*, are of interest in this connection:

"Masters are often compelled, in the performance of their duties, to choose between the probable consequences of imminent perils threatening the loss of the ship, cargo, and all on board, and a sacrifice of some portion of the associated interests in their custody and under their control, as the only means of averting the dangers of the impending peril in their power to employ. They must elect in such an emergency, and if they, in the exercise of their best skill and judgment, decide that it is their duty to lighten the ship, cut away the masts, or to strand the vessel, Courts of justice are not inclined to overrule their determinations.

"Owners of vessels are under obligation to employ masters of reasonable skill and judgment in the performance of their duties, but they do not contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency what, after the event, others may think would have been best. From the necessity of the case the law imposes upon the master the duty, and clothes him with the power, to judge and determine, at the time, whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder. Standing upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction, he can best decide in the emergency what the necessities of the moment require to save the lives of those on board and the property intrusted to his care, and if he is a competent master, if an emergency actually existed calling for a decision whether such sacrifice was required, and if he appears to have arrived at his conclusion with due deliberation, by a fair exercise of his own skill and judgment, with no unreasonable timidity, and with an honest intent to do his duty, it must be presumed, in the absence of proof to the contrary, that his decision was wisely and properly made."

Sacrifices made in good faith for the general benefit are made good in general average, even though made under a mistaken idea

as to impending danger. In *The Wordsworth* (p), where the forepeak filled with water during heavy weather, and it was thought that the steamer was holed below the waterline, the sluices were opened and the water allowed to run to the engine room, doing damage to the cargo. By this means the water in the forepeak was reduced and it was found that the leak was occasioned by a break in the port hawsepipe and there had been no necessity for opening the sluices. The Court stated that the damage to cargo was general average.

To give rise to general average contribution, the sacrifice must be sanctioned by the master, or other person in authority connected with the adventure. Where a ship on fire is scuttled by the port authorities, acting on their own initiative, without the sanction, express or implied, of the master or other commanding officer of the ship, and against the protest of such officer, as respects some of the measures taken; and where it is shown that the acts of the port authorities were not only for the purpose of putting out the fire on the vessel but also to protect and preserve the shipping and other property, the damage done by the port authorities is not general average (q).

Where fire broke out in a vessel alongside a wharf, and the services of the Fire Department were invoked by the officers of the vessel and the master directed the operations of the firemen, the sacrifices made were held to be general average (r).

In *Ralli v. Troop* (rr), there was a strong dissent from the judgment of the Court by two of the judges, and the decision has been the subject of much adverse comment on the part of lawyers, adjusters, underwriters and others versed in matters of general average, who hold the view that as the doctrine of general average is based on the highest principles of equity, the proper question by which to test a general average sacrifice should be, not, Who authorized the act? but Was the sacrifice for the *benefit or safety* of the adventure? Unless the facts are fully understood, the *Ralli* decision is subject to misconception as to its scope. In considering this case the following points should be remembered: the port authorities came to the vessel unsolicited; they did not act with the sanction of the master, but, in fact, acted against his protest in respect to some of the steps taken, and the Court proceeded upon the assumption of fact that the port authorities were influenced rather by a desire

(p) 88 Fed. 313.

(q) *Ralli v. Troop*, 157 U. S. 386; *Minneapolis, St. P. and B. S.S. Co. v. Manistee Transit Co.*, 156 Fed. 424; *Wamsutta Mills v. Old Colony Steamboat Co.*, 137 Mass. 471.

(r) *The Roanoke*, 46 Fed. 297; 53 Fed. 270; 59 Fed. 161.

(rr) 157 U. S. 386.

to protect the shipping and other property of the port than by a desire to effect the greatest possible saving of the vessel and her cargo.

In the seventeen years since the decision in *Ralli v. Troop*, a large number of burning cases have come to my notice, but I have known of only two such cases in which it was necessary to deny the claim for general average on account of the intervention of port authorities.

It is interesting to note that while the *Ralli* case was cited in the English Court in the case of *Papayanni v. Grampian S.S. Co. (s)*, Mathew, J., apparently distinguished that case from the *Ralli* case on the ground that the master sanctioned what was done by the port authorities, and that it was in the interest of ship and cargo.

Where a tug and her tows were in danger of being driven on a lee shore in a storm, and the master of the tug cut the towing hawser and the tows drifted ashore and were lost, it was held that, although it was the act of the master of the tug, the tug was not liable to contribute in general average for the loss of the tows (*t*).

There must be some measure of success as a result of the sacrifice. On this Gourlie (*u*) comments as follows:

Is successful
result
necessary?

“The sacrifice, however, is considered successful if the interests are even temporarily saved, although subsequently overwhelmed by another disaster; as, if a vessel be thrown on her beam ends, and is only righted by a sacrifice of some of the spars and rigging, although the vessel and most of her cargo be afterwards lost by stranding or another peril, contribution would be due from whatever is eventually saved.”

As Lowndes (*x*) adds:

“Gourlie, however, is not satisfied with even this limitation of the older rule requiring that the sacrifice must be successful. He lays down as a principle to be inflexibly adhered to, that that equality which subsisted amongst the several interests at the moment preceding the sacrifice shall be reinstated by the contribution under all circumstances. It appears to me that the principle he contends for, and which certainly, so far as I have had opportunities

(s) (1896) 1 Com. Cas. 448.

(t) *The J. P. Donaldson* (1896), 167 U. S. 599.

(u) Page 8.

(x) Fourth Edition, p. 607.

for observing, governs the general practice of American as well as English adjusters, is precisely that set forth in other words in sect. 6 of the first chapter of this book. Gourlie's republican idea of equality, as a sort of natural level which must constantly be maintained or restored, is practically identical with Arnould's theory, that it must be made in result immaterial whether my property or that of another man, has been taken to save the whole.

"If, then, after a sacrifice of property, the remaining property is totally lost, no matter whether by an independent accident or by that which led to the sacrifice, there can be no contribution, because all are already equal, each having lost all he had on board. But if some part is recovered, there must be a contribution, because the portion sacrificed thereby lost its chance of the ultimate recovery; but this contribution must be so framed as only to put the part sacrificed on an equality with the remainder: *e.g.*, if one-tenth of the entire value be saved, one-tenth of the value of what was sacrificed must be replaced."

The foregoing remains a correct expression of the American law and practice of to-day.

Where a vessel stranded, and a large portion of her cargo was jettisoned for the purpose of floating her, but without avail, and she was abandoned by the crew but later floated off and was picked up derelict and taken into port, Story, J., said:

"In respect to the jettison of the cargo, it is clear that it constitutes a case of general average to be borne by the ship, freight and cargo ultimately saved" (*y*).

Where the general average act has consisted of an absolute outlay of money, *e.g.*, through going into a port of refuge, and the ship is afterwards totally lost on her voyage, our law as to whether or not there must be contribution is unsettled. While there is dictum in an early case (*z*) that under such circumstances contribution is due, no case, so far as the writer is aware, has clearly decided that it is due.

Expenditure
followed by
total loss.

(*y*) *The Nathaniel Hooper*, 3 Sumner, 542; Fed. Cas. 10032, at p. 1188.

(*z*) *Spafford v. Dodge*, 14 Mass. at p. 72 (1817); Gourlie, p. 12.

Gourlie is in favour of contribution. He says:

“No reason can be given why such expenditure should be borne by one person rather than another, and equity clearly requires their division, as otherwise the advancer of money would, without compensation, become an underwriter upon the adventure for the completion of the voyage.”

In *Hobson v. Lord (a)*, however, there is an intimation that only property which has been preserved is bound to contribute to extraordinary expenses.

It seems to me that the party making the advances should be under an obligation to protect them by insurance until the voyage is terminated. At the time of the case mentioned, there was rarely an opportunity so to protect such advances or to apply to the cargo interests for funds, as the means of communication with vessels in ports of distress were limited, and frequently vessels had subsequently been lost, or had arrived at destination before the owners were aware of the accident and the advances made. There was then good reason for holding the cargo liable for contribution if the vessel were lost before the completion of the voyage. Now, by means of the cable, owners are promptly advised of such accidents, and, therefore, are in a position to protect their advances by insurance or to communicate with the cargo interests. Indeed, it is customary for the owner making the advances to effect such insurance, and, therefore, it would seem that the owner should now be charged with this duty, and, if he neglects it, in the event of total loss before arrival at destination the owners of cargo should not be held liable for contribution to such expenses. The premium for such insurance is charged to general average.

In *The Julia Blake (b)*, the Court denied the authority of the master to put burdens of doubtful benefit on the goods, which the owners of the goods, if present, or, if informed by cable of the circumstances, would not have authorized. A cargo owner, if communicated with in such circumstances, would either approve of the expenditure, or disapprove. If he approved, presumably he would insure, or would expect the owner to insure the advances; and if he disapproved and the master still elected to make the expenditure, the master would do so at his own risk, and in that event, presumably *he* would insure. Or, possibly, the master might refuse to make advances for account of all concerned, and require the cargo

(a) 92 U. S. 397, at pp. 405—409.

(b) 107 U. S. 418.

to provide its own share of the expenditures. In such a case, also, no doubt, the cargo owner would insure his outlays.

Another alternative would be for the master to obtain advances on bottomry and respondentia security, when the burden of insuring would be upon the lender. Or, finally, the master, in certain contingencies, might sell a part of the cargo and obtain funds to cover its share of extraordinary disbursements.

If, in any of the cases supposed, the ship and cargo should be totally lost after the extraordinary expenditures were made, the cargo owner would lose nothing beyond the value of the goods, except, possibly, the cost of an insurance premium. If the shipowner or the master, instead of adopting either of these alternative courses should volunteer to make advances for extraordinary disbursements on account of cargo, and should fail to insure them, upon what equitable or legal right could he justify a claim for contribution from the owners of the cargo in the case of its subsequent total loss? I can see no ground for such a claim in principle, and certainly there is no authority for it in decided cases. The shipowner is not always bound to act as banker for the adventure, and if he volunteers to do so without communicating with the cargo, or obtaining its authority, and fails to protect himself by insurance, the risk of subsequent loss of the advances should be upon him, and not upon the cargo.

A possible exception may exist in cases where the master, in good faith, and in the exercise of good judgment, at a time of peril, makes an extraordinary expenditure for the common benefit and safety of the adventure without having an opportunity to communicate with the owners of ship or cargo, and both are subsequently totally lost. In such a case there is ground for the contention that contribution should be made by the cargo owner to the extraordinary expenditures, notwithstanding the subsequent loss of ship and cargo; but the matter is involved in much doubt, and in the absence of authority, no decided opinion is expressed with regard to it.

In a case of voluntary stranding, in the United States Supreme Court, where it was strenuously contended that it was inevitable that the vessel must strand in some place, and there should, therefore, be no general average allowance for the loss resulting from voluntary stranding, Grier, J., in rejecting that contention, said:

Theory of
alternative.

“When contribution is refused, because the thing whose loss is anticipated by the master’s act, is already in danger of destruction, it is to be remembered that the things saved were in equal danger” (*bb*).

And this is unquestionably the principle upon which our law of voluntary stranding and wreck cut away is largely founded.

As Lowndes (c) remarks:

“The law of the United States appears absolutely to reject the doctrine that, to give rise to general average, there must be a choice between two alternative methods of saving the ship and cargo. This is shown in some of the decisions already cited, on the subject of voluntary stranding, and is set forth, not without a certain wholesome scorn, by Mr. Gourlie, who concludes that ‘the only alternative necessary is that of total loss.’”

*Causa
causans.*

There is no difference between English and American law in this regard. The statement of the earlier text writers that there can be no general average when the accident from which the sacrifice emanated has arisen from the ship's unseaworthiness, or from the fault or negligence of the master or crew, or from the *vice propre* of the cargo, is subject to limitation. The doctrine of general average is not dependent upon the cause of the accident which necessitated the sacrifice or expenditure. It is governed by the facts as they exist at the time of such sacrifice or expenditure, and even though the accident has been the result of unseaworthiness, negligence, or *vice propre* of the cargo, there may be a general average; but the party responsible for such unseaworthiness, or negligence, or for knowingly shipping cargo in an unsound condition, is not entitled to contribution (d).

The perils arising from these causes may necessitate sacrifices of the cargo of some of the shippers, and the shipowner's liability may be limited by law to an amount less than the total damage, or the shipowner may be exempted by contract from liability. In such cases, the owners of the cargo would be entitled to contribution, one from the other.

*The City of
Para.*

In *Pacific Mail S.S. Co. v. N. Y. H. & R. Mining Co.* (e), the *City of Para*, loaded with a general cargo, stranded through negligent navigation. As it was feared she would go to pieces, in order to make the vessel rest easy, the sluices were opened and she was filled with water. She was afterwards floated by salvors and taken to destination.

This case arose prior to the passage of the Harter Act (f), and the owners of the vessel were liable for all damages arising from negligence, subject to their right to limit liability to the value of

(c) Fourth Edition, p. 609.

(d) *Schooner Wm. J. Quillan*, 168 Fed. 407; 175 Fed. 207; 180 Fed. 681.

(e) 69 Fed. 414; 74 Fed. 564.

(f) Feb. 13, 1893.

the vessel and freight. Proceedings were taken against the ship by some of the consignees, and her owners' liability was limited to a sum considerably smaller than the cargo loss. This sum was paid into Court and distributed among such owners of the cargo as had taken proceedings.

In the general average statement the damage to the cargo by the flooding of the vessel was allowed in general average. The consignees who had recovered in the Court proceedings were charged with the amounts recovered, and the general average was apportioned on the arrived values of the cargo, including the amounts made good. As the shipowners had surrendered her value, the ship was not brought in as a contributing factor. The average statement was contested by the owners of a shipment of specie on the following grounds, among others:

1st: That there could be no general average, as the accident which gave rise to the sacrifice had been the result of negligent navigation.

2nd: That there could be no general average without the ship contributing.

3rd: That the recovery in the Court proceedings could not be disturbed by application of the principles of general average.

The Circuit Court of Appeals decided against these contentions, and on the first point followed the English decision of *Strang, Steel & Co. v. Scott (g)*.

In a more recent case, where fire broke out through *vice propre* of the cargo, it was held that as the shippers had not knowingly shipped an improper cargo they were entitled to allowance in general average for the damage by water used in extinguishing the fire (*h*). Even if the shippers did have actual knowledge of the condition of the cargo when shipped, other shippers would be entitled to allowance for any damage done to their cargo in extinguishing the fire, with the right of recourse against the guilty party.

Vice propre of cargo.

On February 13, 1893, Congress passed the statute known as the Harter Act, which provided that on compliance with certain conditions the shipowner should not be liable for loss of or damage to cargo resulting from faults or errors in navigation, &c. After this Act became law, it was generally considered that, as its terms exempted the shipowner from direct liability for losses arising from

Effect of Harter Act.

(g) 14 App. Cas. 691.

(h) *Schooner Wm. J. Quillan*, 168 Fed. 407 : 175 Fed. 207 : 180 Fed. 681.

*The
Irrawaddy.*

negligent navigation, he was entitled to recover in general average for the ship's sacrifices which had minimised the greater loss for which he was now relieved from liability. Certain cargo underwriters, however, raised the issue that, as the Harter Act did not expressly mention the subject of general average, there had been no change in the law then existing, and this important question came up for decision in the case of *The Irrawaddy* (i). That vessel had stranded through negligence, and was floated by salvors after a jettison of part of the cargo and after various sacrifices by the vessel. Some of the cargo underwriters settled their liability on the basis of all of the sacrifices and expenditures being general average; others admitted their liability to contribute in general average for all sacrifices and expenditures for which there had been a lien on the cargo in favour of third parties, and contested their liability for contribution to the shipowner's sacrifices, the reason for this distinction being that when the shipowner settled the claims for salvage, jettisoned cargo and other expenses for which third parties had a lien, he did so as the agent for all interests, and if he had not settled them each owner of cargo would have been directly liable to the parties holding liens, and by virtue of the Harter Act the owners of cargo would have been prevented from proceeding against the shipowner to recover the sums paid in satisfaction of such liens. The legal contest, therefore, was solely on the question of the right of the shipowner to recover for his sacrifices. The District Court upheld the owner's right to contribution.

The case then went direct to the Supreme Court of the United States, which reversed the District Court, and held that the Harter Act had not affected the general average liabilities which existed prior to the adoption of that Act, and decided against the shipowner.

The Strathdon. The *Irrawaddy* case was followed by *The Strathdon* (k). In this case, fire broke out in a cargo of sugar, and in order to extinguish it, the steamer was partly filled with water. In the average statement all of the sacrifices were treated as general average. The owners of the cargo contended that the fire was the result of negligence, and that the ship's sacrifices should not be allowed, but that the ship must contribute to the sacrifices of the cargo. The Court held, however, that as the cargo had claimed contribution in general average, the vessel was entitled to offset against the cargo claims to the extent of the cargo's proportion of her own expenditure.

This led to a most unsatisfactory state of affairs. It put the application of the doctrine of general average on a basis of self

(i) 82 Fed. 472; 88 Fed. 987; 171 U. S. 187.

(k) 94 Fed. 206; 101 Fed. 600.

interest, as, if the shipowner's contribution to the cargo's sacrifices proved to be less than the cargo's contribution to the ship's sacrifices, the particular cargo owner interested refrained from claiming in general average—a situation quite opposed to the principles of equity upon which general average is founded. In cases of vessels with general cargoes, where the sacrifices had arisen from negligent navigation, and the cargo of some shippers had been sacrificed and others not, the complications that ensued were practically interminable.

With a view of meeting this situation a clause was inserted in many bills of lading (*l*). The legality of this clause was questioned in the United States District Court in the case of *The Yucatan* (*m*), which held that in effect it was a negligence clause, and that as regards common carriers such clauses were invalid because in conflict with our declared public policy (*n*). Negligence
general
average
clause.
The Yucatan.

This case was followed by that of *The Jason* (*o*), which, loaded with a general cargo, stranded through negligence and was floated by salvors after a jettison of some of the cargo and after sacrifices on the part of the vessel. The bill of lading contained a clause identical with that in the *Yucatan* case. All of the sacrifices and expenditures were treated as general average. The shipowners proceeded against the cargo for the balance due under the average statement, and the cargo proceeded against the ship for contribution to the jettison alone. The District Court, following the *Irrawaddy* judgment, decided against the shipowners' claim, and, following the *Strathdon* judgment, decided against the cargo's claim. On account of the decision in the *Yucatan* case the validity of the bill of lading clause was not argued in the District Court. On the appeal being heard in the Circuit Court of Appeals the validity of the bill of *The Jason.*

(*l*) This clause reads as follows: "If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in general average or for any special charges incurred, but, with the shipowner, shall contribute in general average, and shall pay such special charges as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness."

(*m*) *Ansonia Clock Co. v. N. Y. and Cuba Mail S.S. Co.*, 139 Fed. 894 (*The Yucatan*).

(*n*) The Courts of New York and of some other states have decided that negligence clauses in bills of lading of common carriers are valid. In such cases in those Courts there is no appeal from the State Courts to the Federal Courts.

(*o*) 162 Fed. 56; 178 Fed. 414.

lading clause was argued in that Court for the first time, and the cargo interests made a determined stand for a revision of the law laid down in the *Strathdon* case. The Court held the bill of lading clause invalid, and modified the *Strathdon* doctrine by holding that by virtue of the Harter Act, the ship was exempt from all claims by cargo, direct or indirect (including general average), resulting from negligent stranding, and, while the ship was not liable to contribute, that did not debar the owners of jettisoned cargo from obtaining contribution from the other interests.

This decision was received with much concern in underwriting and average adjusting circles. It appeared to be at variance with other decisions, especially those holding that the United States statute exempting shipowners from liability for losses by fire did not exempt the ship from contribution to the cargo for sacrifices of cargo necessitated by fire (*p*). The logical result of *The Jason* decision is that if two ships strand, one through negligence and the other not, and both jettison cargo, the shipowner whose crew is negligent will now fare better than the shipowner whose navigators are free from fault. As regards the cargo interests, it would have been more advantageous if *The Irrawaddy* had been decided in favour of the shipowner's contention, or if the validity of the bill of lading clause had been upheld.

A petition to the Circuit Court of Appeals for a rehearing was granted, and that Court certified to the United States Supreme Court for its opinion the three following questions:

1. Whether the general average agreement, above quoted from the bills of lading, is valid and entitled the shipowner to collect a general average contribution from the cargo owners under the circumstances above stated in respect to sacrifices made and extraordinary expenses incurred by it subsequent to the stranding for the common benefit and safety of the ship, cargo and freight.

2. Whether, in view of the provisions of the third section of the Harter Act, the cargo owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding for the common benefit and safety of ship, cargo and freight.

3. Whether the cargo owners, under the circumstances above stated, can recover contribution from the shipowner in respect of general average sacrifices of cargo without

(*p*) *The Roanoke*, 46 Fed. 297; 53 Fed. 270; 59 Fed. 161; *The Rapid Transit*, 52 Fed. 320; *The Santa Ana*, 154 Fed. 800.

contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose.

It is expected that the Supreme Court will hear the case in the near future.

It will be seen that the present state of the law is very unsatisfactory, and is decidedly opposed to the principles of general average as recognized and applied by all maritime nations. In England and other leading maritime nations, the shipowner can protect himself by contract. The position of the American adjuster in applying correct principles of general average becomes an unenviable one, as he is met with extraordinary difficulties in the preparation of general average statements, which are already greatly complicated. The questions involved are of very great importance to all engaged in maritime commerce, since a large percentage of general average statements emanate from cases of stranding or collision, and many of such accidents are held to be due to fault. As a result, interminable disputes over facts, and the difficulty of applying principles in the present condition of the law, interfere with the smooth running of commercial transactions; a fair and workable rule is therefore much to be desired.

As before explained, in *The Irrawaddy* the cargo admitted its liability for salvage and other expenses which gave a lien on the cargo to a third party. After that decision, to expedite the completion of the voyage, shipowners generally advanced funds to discharge such liens, feeling secure in their right of recoupment from the cargo. Under the *Jason* decision, such procedure on the part of the shipowner would no longer be safe, unless, before making the advances, he had an absolute undertaking of reimbursement from the cargo interests. He has the right to let the ship wait in the port of distress until each cargo interest has settled the direct liens against it—a course which, if pursued in these days of large vessels carrying many shipments of cargo, would cause endless delays and increase of expense, to the disadvantage of American commerce.

Another feature entitled to consideration is the effect that the denial of contribution to the ship's sacrifices may have on the mind of the master when a sacrifice is necessary. Presumably, these sacrifices were made in order to avoid the greater expenses of salvage or jettison of the cargo. As the shipowner would not be directly liable for this greater loss, is it not fair to suppose that the master's knowledge that a sacrifice of the ship's material would involve no contribution from the cargo may affect his better judgment and cause him to employ salvors, or jettison cargo, being aware that his owner would profit thereby? It seems desirable, in the interest of commerce, that the master should be encouraged to make,

at the right time, the sacrifice best for all the interests concerned, and should not be trammelled by considerations of benefit to a particular interest.

As a learned judge (Clifford, J.) in referring to general average, said:

“The moral tendency of the well-known commercial usage is to induce the master to exercise an independent judgment in the emergency for the benefit of all concerned” (q).

Much experience with these controversies convinces me that underwriters, who are really the parties in interest, would not in the long run suffer greatly if the bill of lading clause were upheld. As a rule, the amount involved in the cargo's contribution to the ship's sacrifices is not serious. Disputes take up a great deal of time and prevent the settlement of important cases, which, in the interest of commerce, is to be deprecated. At times, an underwriter may be interested as an insurer of the ship, and it is then to his interest to obtain contribution from the cargo; and *vice versa*.

When the result of negligence of compulsory pilot.

The United States Supreme Court has decided that at common law the owner of a vessel has no liability for damages resulting from the negligence of a pilot compulsorily employed (r). As in these circumstances, the fault of the pilot is not the fault of the shipowner, a cargo owner is liable for general average arising through such negligence, when the proceedings are at common law.

Effect of negligence when vessel not a common carrier.

When the owner of the cargo has contracted for the entire capacity of the ship, it has been held in the United States Courts that the owner of the vessel is not a common carrier, but a private carrier for hire, and that negligence clauses in the contract of affreightment are valid (s).

While the question of the liability for general average in these circumstances has not as yet come before our Courts, it would seem that in the present state of our law a negligence general average clause, such as that in the cases of *The Yucatan* and *The Jason* (t) would be upheld, and even where the contract only contained the

(q) *Star of Hope*, 9 Wall. 203, *supra*, p. 721; and see *Johnson v. Chapman*, 19 C. B. N. S. 563, at p. 582; 35 L. J. C. P. 23, at p. 28, where Willes, J., said: “It would defeat the main utility of general average if at a moment of emergency the captain's mind were to hesitate as to saving the adventure through fear of casting a burden on his owners.”

(r) *Homer Ramsdell Transportation Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406.

(s) *The Fri*, 154 Fed. 333; *The Royal Sceptre*, 187 Fed. 224.

(t) 139 Fed. 894; 178 Fed. 119.

ordinary negligence clause our Courts would follow the English decisions and the cargo would be liable for general average.

In the United States the vessel must be seaworthy when she *sails* on the voyage, and at each subsequent stage of it. An owner, by proper provision in the contract of affreightment, may be exempted from liability for loss resulting from unseaworthiness or latent defect existing at the time of sailing, provided he has used due diligence to make the vessel seaworthy (*u*).

Bill of lading clause where unseaworthiness or latent defect.

It is, therefore, clear that, so far as concerns unseaworthiness, the bill of lading clause in controversy in *The Yucatan* and *The Jason* is valid; and even where the contract only contains the exemption from losses resulting from unseaworthiness existing at the time of sailing, our Courts would be likely to follow the English decisions in cases arising from negligence, and would uphold the claim for general average.

All the necessary consequences of a sacrifice must be regarded as the sacrifice itself (*x*).

Rule as to consequences.

All the immediate and direct consequences of a sacrifice, although these consequences were neither intended nor beneficial, are taken as entering into and forming a part of the sacrifice (*y*).

Gourlie says (*z*):

"It may suffice to say, however, that not only all the necessary but many of the unnecessary consequences of the act may be regarded as the act itself. In regard to sacrifices, not only the known, but the conjectural, and in some cases the accidental, results of the original sacrifice are considered to follow it as a logical consequence or extension of the original act."

Examples of this, recognized as general average, are damage done by water going down hatches opened to effect a jettison; damage to cargo lightered in order to float a stranded vessel; the carrying away of another mast by one which had been cut away.

In the case of *Norwich & N. Y. Trans. Co. v. Ins. Co. of N. A.* (*a*), the steamboat *City of Worcester* struck a rock and sprang a serious leak. The master beached her upon what he supposed was hard sand, but it proved to be a soft bottom. Sinking deeper in the grip of the mud, the vessel did not rise with the tide, and the water went

(*u*) *The Caledonia*, 157 U. S. 124.

(*x*) *Columbian Ins. Co. v. Ashby*, 13 Pet. 331 (1839).

(*y*) *Parsons on Maritime Law*, p. 304. See *The Wordsworth*, 88 Fed. 313.

(*z*) P. 13.

(*a*) 118 Fed. 307; 129 Fed. 1006; 194 U. S. 637.

through the gangways of the main deck, where the cargo was stowed (as is customary with vessels of that class), and much damage to cargo resulted. The immediate cause of the damage was the mud in which the vessel sank, which was neither known to nor contemplated by the master; but, as the beaching was a justifiable general average act, the Court held that the cargo damage was general average.

In another case, a vessel was cut through by the ice, and to prevent sinking was beached. After the stranding the cargo was badly damaged by large quantities of water which entered the ship through the holes cut by the ice. The Court held that the damage to the cargo was not general average, having been caused by a peril of the sea (*b*).

Where a steamer's shaft was fractured at sea, and in order to save towage was temporarily repaired by inserting bolts across the fracture, and later the bolts carried away and extensive damage was done to the machinery, it was held that, as the master expected to reach port with the repaired shaft the further damage was not general average (*c*).

Some further instances of the rule in practice, which have not gone to litigation, may be of interest. *The Somerhill*, in leaving port, stranded in an exposed position in the narrow entrance to the port, her fore part only being aground. The master made hawsers fast to trees on an island in the centre of the entrance, and, fearing that if the vessel floated she might run over on the rocks at the opposite side before her headway could be checked, he made preparations for dropping the anchors. The hawsers were hove on and the engines worked astern, and when the vessel floated, to check her sternway, the engines were put ahead and the anchors were dropped, but did not hold her, and she ran over on the rocks on the other side and was badly damaged. This damage was allowed in general average as a consequence of the act of floating her.

The Victoria,
1907.

The steamer *Victoria* was moored in an open harbour, when a storm arose and she was in danger of drifting on the rocks; the master, in order to prevent destruction, slipped the anchors, and cast off the moorings and put the engines full speed ahead, for the purpose of running to sea, but before the vessel gained headway she struck on the rocks. The damage occasioned thereby was treated as the consequence of the general average act of running to sea. Several other similar cases have been dealt with in the same manner.

Where vessel
in ballast, or

General average is payable where there is only a single interest

(*b*) *Fowler v. Rathbones*, 12 Wall. 102.

(*c*) *Van Den Toorn v. Leeming*, 70 Fed. 251; 79 Fed. 107.

at stake, as where the vessel is in ballast (*d*), and in the case of a vessel and cargo same ownership. yacht (*e*). Conclusion.

We may conclude that there is little difference in regard to general principles between the American and English law of general average. In recent years there have been some decisions of our Courts which show a tendency towards the "physical safety" theory, as being the true basis of general average, and others which favour the "end of the adventure," or "mutual benefit" theory.

The more notable among the former are *Earnmoor S.S. Co. v. New Zealand Ins. Co.* (*f*), which involves the question of substituted expenses; *Bowring v. Thebaud* (*g*), where a vessel was pierced by an unknown obstruction while loading cargo at a dock and required temporary repairs, and it was held that there was no case for general average because there was no peril to ship or cargo, and because of the shipowner's implied warranty of seaworthiness at the time of sailing; and *L'Amerique* (*h*), where the vessel stranded near destination, salvors discharged the cargo, which was delivered to consignees, and ten weeks later the vessel was floated: it was held that the salvors' expenses, after discharge of the cargo, were chargeable to the ship alone.

Several important cases have supported the "mutual benefit," or "end of the adventure" theory, where sacrifices or expenses were a continuation of a series of measures taken for the common benefit before any separation of interests whatever, and where the continuation of the voyage was in contemplation, although at the time when some of the measures were taken the cargo was temporarily in a place of safety.

In a case in the Supreme Court (*i*), the Court said:

"Where the whole adventure is saved by the master, as agent of all concerned, the consignments of cargo first unloaded and stored in safety are not relieved from contributing towards the expenses of saving the residue, nor is the cargo in that state of the case relieved from contributing to the expense of saving the ship provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of the whole of the interests and by one continuous series of measures."

(*d*) *Potter v. Ocean Ins. Co.*, 3 Sumner, 27; *Dollar v. La Fonciere*, 162 Fed. 563.

(*e*) *Risley v. Ins. Co. of North America*, 189 Fed. 529.

(*f*) 73 Fed. 867.

(*g*) 42 Fed. 794; 56 Fed. 520.

(*h*) 35 Fed. 835.

(*i*) *McAndrews v. Thatcher*, 3 Wall. 347.

A vessel on fire put into a port of refuge, part of the cargo was hurriedly discharged into lighters, and the vessel was then scuttled; she was subsequently raised and proceeded with the cargo remaining in her to destination, the cargo which had been discharged into lighters was forwarded to destination in other vessels by the carrier; it was held that the cargo which was in safety on lighters must contribute to the losses and expenses resulting from the scuttling. In the judgment of the Circuit Court of Appeals the difference between English and American law is pointed out (*k*).

In another case, *The Joseph Farwell* (*l*), the Court said:

"The cargo was liable to contribute for any general average or expenses incurred as long as it was 'at risk.' Physical destruction or direct physical injury to the cargo was not the only risk to which it was exposed. Its value depended, at least is supposed to have depended, in some degree, upon the successful prosecution of the voyage. Until that was broken up, the cargo, although it was separated from the ship, and put in a place of present safety, was not so completely separated from the ship and from the whole adventure as to leave no community of interest remaining. It was not entirely disconnected with the enterprise, and it must be regarded as still 'at risk,' and liable to contribute, if it was still under the control of the master, and liable to be taken again on board for the purpose of being carried to its destined port."

SACRIFICES OF SHIP.

Jettison of
ship's stores.

Jettison of ship's stores, hawsers, chains, water casks, &c., is to be contributed for in general average provided the circumstances warrant the sacrifice, and, if they are jettisoned from the deck, provided they were properly stowed on deck (*m*). Such sacrifices, however, demand close scrutiny (*n*).

Anchors and
chains.

The loss of anchors or cables abandoned for the common benefit is admitted as general average, but if the anchor was fouled on the bottom so that it could not possibly have been saved, the slipping

(*k*) *Reliance Marine Ins. Co. v. N. Y. and Cuba Mail S.S. Co.*, 70 Fed. 262; 77 Fed. 317; 165 U. S. 720. See also, *Nelson v. Belmont*, 21 N. Y. 36; *Pacific Mail S.S. Co. v. The N. Y. H. & R. Mining Co.*, 74 Fed. 564.

(*l*) 31 Fed. 844.

(*m*) *Gourlie*, p. 92.

(*n*) *The Santa Anna Maria*, 49 Fed. 878.

of it is not considered a sacrifice. If, owing to a peril threatening the adventure, the ship is anchored in an unsafe place and the chain is slipped to get her clear, it is general average (*o*).

If, to avoid an impending peril, such as a collision or grounding, an anchor is suddenly let go, while the vessel is under headway, or in the emergency the usual preparations had not been made and the anchor is lost thereby, it is treated as a sacrifice.

Anchor let go under unusual conditions.

Damage to anchors and chains used in the efforts to float a stranded vessel is allowable (*oo*).

In floating stranded vessel.

Damage by carrying a press of sail is not allowed (*p*).

Press of sail.

Cutting away of masts, spars and sails to righten a vessel when on her beam ends, or to ease her when ashore, or otherwise to avert some imminent danger, and all the damage naturally resulting from the fall of the spars, are the subject of general average (*q*).

Cutting away masts, spars, &c.

Coal and engine stores consumed from the time of bearing up for a port of distress to the time of resuming the voyage are always treated as general average, but not in regaining the position from which the ship deviated (*r*).

Coal and engine stores bearing away, &c.

Damage caused by voluntary stranding is general average whether the vessel is afterwards saved or is totally lost by the stranding, even where the vessel must inevitably strand, but is run ashore in a different place. It is a sufficient ground for allowing contribution that the damage sustained by the voluntary act is different in its character or extent (*rr*).

Voluntary stranding.

Lowndes, in the 4th edition, pp. 126—135, has carefully reviewed the leading American decisions; since that edition was issued, two cases have come before the American Courts. In one of these, with which I have already dealt (*s*), the principle of the earlier cases was reaffirmed in the broadest possible terms.

In the other case, the right to contribution was denied, on the express ground that the testimony showed that soon after the anchor was slipped the vessel stranded in substantially the same place and under the same conditions as would have happened in any event, and with the same result to vessel and cargo; and on the further

(*o*) Gourlie, 195, 196.

(*oo*) *Roberts v. The Ocean Star*, Fed. Cas. 11908.

(*p*) 2 Phillips, Ins. 1296; 2 Parsons, Ins. 302; Gourlie, 203.

(*q*) *Rogers v. Mechanics' Ins. Co.*, 1 Story, 604, and cases cited in Gourlie, p. 174.

(*r*) Gourlie, p. 243.

(*rr*) *Caze v. Reilly*, 3 Wash. Cir. Ct. Rep. 298; Fed. Cas. 2538; *Sims v. Gurney*, 4 Binney's Penn. Rep. 513; *Gray v. Waln*, 2 Serg. & Rawle, 229; *Columbian Ins. Co. v. Ashby*, 13 Pet. 343 (U. S. Sup. Ct.); *Barnard v. Adams*, 10 How. 270 (U. S. Sup. Ct.); *Star of Hope*, 9 Wall. 203 (U. S. Sup. Ct.); *Sturgess v. Cary*, 2 Curt. 59; Fed. Cas. 13572; *Rea v. Cutler*, 1 Spr. 135; Fed. Cas. 11599.

(*s*) *Norwich and N. Y. Trans. Co. v. Ins. Co. of N. A.* (*supra*, p. 737).

ground that the only object in stranding the vessel was to save the lives of the crew (*t*).

Temporary repairs.

The law of the United States differs in this respect from that of England. Reasonable temporary repairs of damage arising from excepted perils, made at some intermediate port, where permanent repairs cannot be made, if necessary to remove the disability of the ship to proceed on her voyage, are now regarded as general average. Such repairs must be purely temporary in their nature and must serve no permanent purpose (*u*). Temporary repairs made solely to save the excessive cost of permanent repairs are not general average.

When permanent repairs can be made at a port of refuge, but at a large expense, and it would necessitate the discharge of cargo and the incurring of heavy general average expenses, and, perhaps, serious damage to cargo in handling, it is the practice to treat the temporary repairs as general average; but it is contended by some that repairs in such a case are really substituted expenses, and, in fairness, the cost of such repairs should be apportioned on the saving to all parties, and there is much to be said in favour of this view.

Damage done in extinguishing fire, &c.

Damage done to a vessel in the efforts to extinguish a fire (*x*), or in removing a vessel from the vicinity of a fire, is general average.

In salvage operations.

Damage done to a vessel by salvors is general average when the compensation of the salvors is general average. This includes damage done by salving vessels when coming alongside, &c.

Coal and engine stores used up and damage done in floating stranded vessel.

Coal and engine stores used up, and damage done to the vessel or her machinery through the efforts to float a stranded vessel, are general average when the vessel is in a position of peril and it is to be reasonably supposed that the possibility of damage was within the contemplation of the master.

Damage to a vessel's bottom, as being attributable to the efforts to float her, is very rarely allowed in general average in this country, for the lack of clear proof that the damage was due solely to the efforts to float, and not to the stranding and pounding on the bottom by the action of wind and sea.

State of wreck, wreck cut away.

The practice in the United States differs from that of England with regard to wreck cut away (*y*). If a mast or spar should be

(*t*) *Shoe v. Low Moor Iron Co.*, 46 Fed. Rep. 125; 49 Fed. Rep. 252.

(*u*) *Hobson v. Lord*, 92 U. S. 397; *Bowring v. Theband*, 42 Fed. 796; *Star of Hope*, 17 Wall. 651; Phillips on Insurance, 5th ed. sec. 1500.

(*x*) *Nimick v. Holmes*, 25 Penn. St. 366; *Ralli v. Troop*, 157 U. S. 386; *semble*, *Nelson v. Belmont*, 12 N. Y. Sup. Ct. 310; *N. Y. and Cuba Mail S.S. Co. v. Reliance Mar. Ins. Co.*, 70 Fed. 262; 77 Fed. 317; 165 U. S. 720.

(*y*) [The difference seems to be that in England the question is whether the wreck, even if not cut away, was, in the existing circumstances, hopelessly lost. In the United States the question is whether the wreckage could have been saved in the hypothetical case of the storm suddenly subsiding.—EDITORS.]

accidentally carried away and while hanging alongside should threaten the general safety, and therefore should be cut away, allowance must be made in general average for the value of the material cut away (*z*). In this case the following language of Butler, J., is worth quoting:

“Was there, at the time, a reasonable chance of saving the property but for the continuance of the storm? If there was, it was not lost, and the casting away of this chance for the common safety was a voluntary sacrifice which will support a claim to contribution.”

Similarly, cutting away at sea a rudder torn loose in a gale, and a source of danger, is a general average act (*a*).

In adjusting the loss, the value of the material is to be estimated as if it had been recovered from the sea and stowed in safety on board the vessel (*b*).

If it is clear that the material could not be saved had the storm immediately subsided, or, if saved, would have had no value, there would be no allowance. Adjusters had before them the difficulty of deciding the proper value to allow for the material cut away. After the *Mary Gibbs* judgment a working scale (*c*) for such allowances was prepared by the late Captain F. A. Martin, an able expert of the New York Board of Underwriters. This scale is supposed to represent the value of the materials sacrificed, due consideration being given to the possibilities of damage while the wreckage was overboard, and to the fact that, even if it were saved, certain expenses would necessarily be incurred.

In dealing with York-Antwerp Rule IV., the American adjusters sometimes give it a liberal construction. If, in cutting away a mast or spar which has previously been carried away, and is hanging aloft and a source of danger to the whole adventure, the wreckage falls and breaks the rails, or boats, or does other damage, American adjusters make allowance in general average for the damage done by the falling wreckage, reasoning that the rule was never intended to exclude such damage.

(*z*) *The Margarethe Blanca*, 12 Fed. 728; 14 Fed. 59 (1882).

(*a*) *May v. Keystone Yellow Pine Co.*, 117 Fed. 287.

(*b*) *The Mary Gibbs*, 22 Fed. 463 (1884).

(*c*) Wooden masts and spars overboard; when cut away, no allowance unless clearly shown that they were not broken at the time of the cutting away. Iron masts and spars allowed in full; if known to be broken, no allowance. Iron work on wooden masts and spars, 80 per cent.; blocks, 70 per cent.; standing rigging, 50 per cent.; running rigging, $33\frac{1}{3}$ per cent.; sails, $33\frac{1}{3}$ per cent. All of the above to be subject to the usual deduction of one-third new for old. No allowance to be made for the cost of setting up the rigging, or masts and spars, as that would be necessary in any event. The cost of refitting the rigging to be allowed on the same basis as the rigging.

Abnormal use of engines. The following are instances in practice of damage resulting from the abnormal use of engines:

The Vandalia, 1907. Where, in consequence of a fire at sea, the forehold of a steamer was flooded, which put her down by the head to such an extent that the propeller was largely out of water and the working of the engines under those conditions caused considerable damage to the machinery, which was fairly within the contemplation of the master and engineers, the damage so sustained was made good in general average.

The Marienfels, 1909. Similarly, in another case, where the foreholds filled when the vessel struck a rock and the engines were worked under the same conditions as in the preceding case, the damage to the machinery and from the straining of the after part of the vessel was allowed in general average.

The Egremont Castle, 1907. Where fire broke out at sea in the afterholds and large volumes of smoke entered the tunnel, and in order to work the engines it was necessary to close the tunnel door, and it was impossible for men to enter the tunnel to oil the bearings, and the engines were kept going at full speed to reach port, resulting in damage to the bearings through running the engines without oiling them, the damage was allowed in general average. The facts showed that the damage was contemplated.

Damage to pumps. Damage resulting from the excessive use of pumps in freeing a vessel of water is not general average, the pumps having been used for the purpose for which they were intended. If they are put to an abnormal use it is general average.

A steamer had fire in her cargo of chemicals; the water which was used to extinguish the fire became strongly impregnated with acid, and in pumping it out, the ship's pumps were seriously damaged; the adjusters treated the damage as general average.

On the same principle it would seem that, even if the water had not got into the ship as a result of a sacrifice, the damage to the pumps would be general average.

Miscellaneous sacrifices of ship. Various other acts in the nature of sacrifices are treated as general average: *e.g.*, materials used up in making a temporary rudder or drag, jury mast or jury sails, staving boats or bulwarks to let water out when the decks are flooded, sails used to stop leaks, or let go to righten a vessel and blown away, sails and spars cut away to save a mast when the loss of the mast would endanger the vessel, materials used up in making temporary repairs at sea, damage through tipping a vessel at a port of refuge to make repairs, and the abnormal use of the machinery or the vessel's appurtenances for a purpose for which they were not intended.

In conclusion, it would seem that with the exception of so-called

wreck cut away and voluntary stranding, the law and practice in America concerning the sacrifices to be allowed are the same as in England.

SACRIFICES OF CARGO.

"Jettison," says Gourlie (*d*), "has ever been regarded Jettison.
as the purest type of a general average act; its only claim
to this distinction, however, lies in its being one of the
earliest occasions of a general average act."

Jettison of cargo to enable a ship to receive passengers of a vessel in distress is not a general average sacrifice (*e*).

A jettison made to reach the seat of a fire or to prevent it from Jettison to
spreading is a subject for contribution. Packages jettisoned which get at fire.
are actually on fire are not allowed for (*f*). But burnt packages Packages
which are no longer on fire are, if jettisoned, allowed for at their on fire.
estimated value.

When a portion of the cargo is carried on deck in accordance Deckload
with the custom of the trade, and from the circumstances of the case, jettison.
the voyage and the character of the deck shipment, such custom is
reasonable and just, compensation is due for a necessary jettison
of it (*g*) (*h*).

It would seem that where one shipper loads a full cargo of mixed goods, part on deck, without any special exemption of contribution on the part of the ship, if the deckload be jettisoned the ship must contribute to the jettison.

Jettison of horses carried on deck in accordance with custom is general average (*i*).

Structures not included within the frame of the vessel are con- Poop and
sidered to be part of the deck (*k*). deck houses.

Many of the steamers navigating on Long Island Sound, and Lake, sound
on the rivers and lakes, are so constructed that the cargo is all and river
steamers.

(*d*) P. 74.

(*e*) *Dabney v. New England, &c. Co.*, 14 Allen, 300.

(*f*) *Slater v. Hayward Rubber Co.*, 26 Conn. 128.

(*g*) Gourlie, p. 86, and cases cited, p. 87, note 2.

(*h*) The rule of the Average Adjusters' Association of the United States in dealing with this subject is as follows:

"Where cargo consisting of one kind of goods is, in accordance with a custom of the trade, carried on and under deck, that portion of the cargo loaded on deck shall be subject to the same rules of adjustment in case of jettison, or expenses incurred, as if the same were laden under deck."

(*i*) *Brown v. Cornwell*, 1 Root (Conn.) 60 (1773). This is the first decision dealing with general average recorded in any American report.

(*k*) Gourlie, pp. 88-91; *The Kirkhill*, 99 Fed. 575.

necessarily carried on the main deck. In such instances it is treated for purposes of general average as if it were under deck (*l*).

Damage through opening of hatches.

Damage done to cargo by water going down the hatches when they have been opened to effect a jettison, is contributed for (*ll*).

Damage in extinguishing fire.

Damage done to cargo by water used to extinguish a fire, or by scuttling or sinking the ship, for the same purpose, is allowed in general average. In fact, as Lowndes states (*m*), the judgment in *Nimick v. Holmes* may be said to have laid the foundation of English law on this subject. There is some qualification of this rule when the steps are taken by the port authorities without the intervention or sanction of the master (*n*).

Effect of fault of crew.

Pending the final decision in *The Jason* case (*o*) it is difficult to say what effect the fault of the crew has on a claim for contribution arising from fire. Under U. S. Revised Statutes, 4282, the shipowner is not responsible for losses by fire, even though occasioned by fault of the crew.

Effect of statute exempting shipowner from losses by fire.

Our Courts have held that, although by this statute the shipowner is exempted from direct liability, he must, nevertheless, contribute to sacrifices of the cargo made necessary by fire (*p*).

Until *The Jason* is decided, it is difficult to say what the law is regarding the liability of the cargo in such a case as respects sacrifices of the vessel. On the authority of the *City of Para* (*q*), it is certain that in any event there must be contribution among the various cargo owners.

It has been stated that there can be no contribution when the nature of the cargo is such that, once it has taken fire, there is no possibility of preventing its total destruction. An early case (*r*) is often incorrectly cited as disallowing contribution in the case of a cargo of lime, but it merely states the foregoing principle. In fact, in a more recent case (*s*) it was decided that contribution was due for a cargo of lime.

Increase of smoke or fire damage by efforts to extinguish fire.

The spread of fire or smoke damage incidental to proper efforts to extinguish the fire is not general average (*t*).

(*l*) *Harris v. Moody*, 30 N. Y. 266.

(*ll*) *Gourlie*, p. 113; *The Brig Mary*, 1 Sprague, 17.

(*m*) Fourth edition, p. 610.

(*n*) *Ralli v. Troop*, 157 U. S. 386; *Nimick v. Holmes*, 25 Penn. 366; *Nelson v. Belmont*, 12 N. Y. Sup. Ct. 310; *N. Y. and Cuba Mail S.S. Co. v. Reliance Mar. Ins. Co.*, 70 Fed. 262; 77 Fed. 317; 165 U. S. 720.

(*o*) *Ante*, p. 733.

(*p*) See cases cited, *ante*, p. 734, note (*p*).

(*q*) 69 Fed. 414; 74 Fed. 564.

(*r*) *Crockett v. Dodge*, 3 Fairf. (12 Me.) 190 (1835).

(*s*) *The Rapid Transit*, 52 Fed. 320; see also *Columbian Ins. Co. v. Ashby*, 13 Pet. pp. 331, 340.

(*t*) *N. Y. and Cuba Mail S.S. Co. v. Reliance Marine Ins. Co.*, 70 Fed. 262; 77 Fed. 317; 165 U. S. 720.

Cargo or ship's materials used for fuel are treated as general average, provided the ship started on her voyage with an adequate supply of fuel. In determining what is an adequate supply, the quality of the coal, the condition, speed and power of the vessel, the length of the voyage and the season of the year must be given due consideration. Should the supply of fuel become exhausted, not from unfavourable weather, but from the insufficiency of the supply, the vessel is deemed unseaworthy and the parties at fault must pay the penalty arising from their neglect (*u*).

Cargo burnt as fuel.

Damage done to cargo by flooding a stranded vessel to prevent her from pounding to pieces, is general average (*x*).

Cargo damaged by flooding stranded vessel to ease her.

Where the cost of discharging or lightering cargo is general average, the damage done to the cargo, or shortage of cargo arising from such operations, is always treated as general average. This includes damage by exposure while on lighters, or in landing the cargo on a beach (*y*).

Damage by discharging or lightering cargo.

Deterioration of, or damage to cargo discharged at a port of refuge, arising from delay, change of climate, wastage, &c., if the same influences would have prevailed had the cargo been retained on shipboard, is not a consequence of the discharge, and is not contributed for (*z*).

At a port of refuge: damage by delay; change of climate.

If, however, in handling cargo at a port of distress it is exposed to the elements, which would not have been the case had it remained on board, the damage caused thereby is allowed.

When a voyage is broken up at a port of refuge, and the damage to the cargo cannot be distinguished as between the act of discharging and the act of forwarding, it is the practice to allow one-half the damage in general average as caused by the discharge, the other half being attributed to the reloading or forwarding (*a*). If, however, the cost of forwarding is general average, the whole of the damage is allowed.

When voyage broken up.

When a stranded vessel is in a state of wreck, and there is no contemplation of reuniting ship and cargo, it being a case of *sauve qui peut*, the damage done to cargo in handling is not general average (*b*).

When in state of wreck.

(*u*) *Hurlbut v. Turnure*, 81 Fed. 208.

(*x*) *Pacific Mail S.S. Co. v. Dupre et als.*, 74 Fed. 250.

(*y*) *Hennen v. Monroc*, 8 Martin, La., 227 (IV. 449; O. S., 1826); *Lewis v. Williams*, 1 Hall, N. Y. 430; *Gourlie*, 213; *Heyliger v. N. Y. F. Ins. Co.*, 11 Johns. R. 85.

(*z*) *Spafford v. Dodge*, 14 Mass. 65 (1817); *Gourlie*, 214.

(*a*) *Gourlie*, 216.

(*b*) *Ibid*.

Goods burnt
or stolen in
warehouse, or
lost in salvage
operations.

The damage to cargo by fire, while stored in a warehouse at a port of refuge, is not treated as general average. There is, however, *dictum* to the contrary (*c*). To make such an allowance would certainly be an extension of the doctrine of general average. Ordinarily, the risk to cargo of damage by fire is no greater when it is in a warehouse than if it had remained on the vessel, and such loss is in the nature of a second accident. If that were allowable, then a vessel moored at a wharf in a port of distress and damaged by fire communicated from the wharf would be equally entitled to contribution for her damage.

Cargo pilfered or stolen, whether from a warehouse, or by stevedores handling it at a port of refuge, or in salvage operations, is in practice allowed.

Cargo shut
out at a port
of distress.

Where on account of the lack of proper facilities for restowing cargo which has been discharged at a port of distress, part of it is shut out and is forwarded by another vessel, or sold, the expense or loss arising therefrom is treated as general average (*d*).

Voluntary
stranding.

Cargo damaged through the voluntary stranding of a vessel is a subject of contribution, but where, after the voluntary stranding, water enters the vessel through holes or leaks existing prior to the voluntary stranding, the damage caused thereby is not recoverable (*e*).

Hole made
by mast
cut away.

Where in cutting away a mast it splinters and tears up the deck, and thereby water gets into the hold and damages the cargo, this damage is contributed for (*f*).

Damage
through tip-
ping vessel to
effect repairs.
Cargo
pumped
overboard.

Where a vessel is tipped to effect repairs and the cargo is damaged thereby, it is the subject of contribution.

Cargo pumped up at sea in relieving a ship of water (not in the ship as the result of a sacrifice) is not treated as general average, there being no intention on the master's part to make a sacrifice. Where, however, as frequently happens on the Great Lakes, cargo, such as grain, is deliberately pumped overboard by salvage pumps to lighten the vessel, allowance is made in general average.

Passengers'
baggage.

Passengers' baggage stored in the ship's compartments, and not in use on the voyage, is contributed for in case of sacrifice (*g*).

(*c*) *Brig Mary*, 1 Sprague, 17 (1841).

(*d*) Gourlie, 218.

(*e*) *Fowler v. Rathbones*, 13 Wall. 102; *Norwich and N. Y. Trans. Co. v. Ins. Co. of N. A.*, 118 Fed. 307; 129 Fed. 1006; 194 U. S. 637.

(*f*) *Maggrath v. Church*, 1 Caines, N. Y. 196; *Brig Mary*, 1 Sprague, 17.

(*g*) *Hege v. North German Lloyd*, 33 Fed. 60.

As Lowndes says (*h*):

Conclusion.

“Looked at broadly, then, it may be said that this branch of the law of the United States referring to sacrifices of cargo is identical with our own.”

The only difference, apparently, is in the case of cargo damaged through voluntary stranding (*i*).

SACRIFICES OF FREIGHT.

Freight lost as a consequence of a general average act or sacrifices is to be contributed for (*k*).

EXTRAORDINARY EXPENDITURE.

1. *Salvage Charges.*

Where the services of salvors are rendered at a time of imminent peril, are continuous, and benefit both vessel and cargo, the compensation paid to the salvors, however or whenever liquidated, is general average (*l*). Salvage in general.

For many years a controversy existed in the United States as to whether or not compensation for salvors' services for the common benefit was properly general average. It was argued that when each interest made a separate settlement of the salvors' claims, or the salvage was awarded by the Court, the settlements effected were final and should not be reapportioned as general average. The other view was that the employment of salvors was akin to the jettison of cargo, or to other steps taken to relieve the adventure from peril; the object to be attained was the general safety, and it was a general average act.

(*h*) Fourth edition, p. 613.

(*i*) [A rule of practice of the English Association of Average Adjusters certainly excludes from general average the damage to ship or cargo resulting from a voluntary stranding, except when such damage is done by beaching or scuttling a ship on fire, but the English Courts have not had an opportunity of laying down a rule of law on this subject.—EDITORS.]

(*k*) *The Nathaniel Hooper*, 3 Sumner, 543; *Mutual Ins. Co. v. Brig George, Olcott*, 89—157.

(*l*) *The Jason*, 162 Fed. 56; 178 Fed. 414. This feature of *The Jason* case is not on appeal to the Supreme Court, and the law may now be regarded as settled. See also *McAndrews v. Thatcher*, 3 Wall. 317 (U. S. Sup. Ct.).

Salvage liabilities are a lien on the property, and, in incurring them, the master, in effect, makes a sacrifice of the property. In earlier days the settlement of salvage claims on cargo was frequently made by a delivery in kind, and in such circumstances allowances would be made in general average for the cargo delivered to the salvors.

The Jason stranded, and was floated by salvors and taken to destination with her cargo on board. The services were continuous, and there was no separation of interests. The vessel and cargo interests settled with the salvors separately and on a different basis. In the average statement the entire payments were pooled as general average, and the Court expressly approved this method of equalizing the burden of the salvage expenses.

Life salvage. The law of the United States differs from English law in that there is no liability for life salvage, although, where the salvors save life in conjunction with property, that fact receives consideration in the Court's award.

If life salvage is incurred in a foreign port, and the vessel completes her voyage to the United States, the amount paid would be recoverable in general average, on the theory that there was a lien on the property for it while the vessel and cargo were within the foreign jurisdiction.

Complex
salvage
operations.

Where, after stranding, the ship and cargo are saved by one continuous series of measures, as, discharging, heaving off the empty vessel and reloading, and the voyage is resumed, all of these expenses are general average (*m*). In fact, it may be said that even if the voyage is not resumed, and the expenses are incurred while there is still a fair expectation of the continuance of the voyage (*n*), the whole of the expenses up to the time the voyage is abandoned are general average, even though, before the ship was floated, the cargo may have been discharged and put in a place of safety.

(*m*) *N. Y. and Cuba M. S. S. Co. v. Reliance Mar. Ins. Co.*, 70 Fed. 262; 77 Fed. 317; 165 U. S. 720; *McAndrews v. Thatcher*, 3 Wall. 347. In the latter case the Court said: "Except when the disaster occurs in the port of destination, or so near it that the voyage may be regarded as ended, the master, if the goods are not perishable, has the right, and if practicable, it is his duty to get off the ship, reload the cargo, and prosecute the voyage to its termination. Where the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladed and stored in safety are not relieved from contributing towards the expenses of saving the residue, nor is the cargo, in that state of the case, relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures" (p. 371).

(*n*) *The Joseph Farwell*, 31 Fed. 844.

Where the stranding occurs near the port of destination and the cargo is discharged and delivered to the consignees, and the vessel is subsequently floated, the situation is more difficult.

Where
stranded near
port of
destination.

In *McAndrews v. Thatcher* (o), the ship *Rachel*, bound for New York, stranded during a gale in the Lower Bay of New York. Ineffectual efforts were made to tow the vessel afloat. Salvors were then employed by the master. Being unable to move the vessel otherwise, they discharged the cargo into lighters and transported it to New York, where it was landed in care of the ship's agents, and, on an average bond being signed, was delivered to the consignees. A few days later the salvors abandoned their efforts to save the ship. Thereupon, the underwriters on the ship sent other salvors aboard the vessel. Four days later, the crew having refused duty, the master, being unable to do more than he had done, abandoned the ship and left her where she lay in charge of the agents of the underwriters. The salvors employed by the underwriters succeeded in floating the ship about six weeks later, but at an expense exceeding her value when saved. The shipowners, suing for account of their underwriters, claimed that the entire salvage, including the compensation paid to the salvors employed by the underwriters, after the cargo had been delivered and the master had abandoned the ship, should be treated as general average. The United States Circuit Court for the Southern District of New York upheld this view, but the decision was reversed in the Supreme Court. It was held in the latter Court that the liability of cargo to contribute in general average in favour of the ship does not continue after the cargo has been completely separated from the vessel, so as to leave no community of interest remaining, and that, in the circumstances of the case, community of interest ceased when the master abandoned the ship.

In the course of the opinion, Mr. Justice Clifford considered the contention which was presented, "that if the vessel does not float when the whole cargo is discharged, the subsequent expenses do not concern the cargo, but are particular average on the vessel in the same manner as repairs." He refused to admit it as a correct statement of the rule, saying (p):

"Although the stranded vessel may not float, as a consequence of the unlading of the goods, still she may be so lightened by the operation, that the usual appliances at hand may be amply sufficient to enable the master to rescue the vessel without much expense or delay, and put her

(o) 3 Wall. 347.

(p) 3 Wall. at p. 368.

in a condition to receive back the cargo and transport it to the port of destination; and, in the case supposed, it cannot be doubted that the expense of saving the vessel, as well as the expense of preserving and reloading the cargo, would be the proper subject of general contribution."

Dealing particularly with the case of a stranding in the harbour of the port of destination, Clifford, J. (*q*), said:

"So, where the cargo consists of various consignments, and the vessel is stranded in the harbour of the port of destination, it will seldom or never happen that all the consignments will be delivered at the same time. On the contrary, some of necessity will be delivered before others; and yet, if the unloading of the cargo has the effect to make the vessel float, and the whole adventure is saved by one continual, unremitted operation, under the directions of the master, as the agent of all concerned, it would seem that the case was one falling directly within the equitable principle of general average, which requires that all the interests shall contribute for the expenses incurred to save the whole adventure from common peril."

In view of this statement of the law it was for many years the practice of adjusters, when a vessel was stranded near her port of destination and the cargo was all discharged, and subsequently the vessel was floated, sometimes after a long delay, to treat the whole of the salvage charges as general average. But in 1888 the correctness of this practice was challenged in the case of *L'Amerique* (*r*), which stranded near New York, her destination, and was not floated until some ten weeks after the cargo had been delivered, although the operations were continuous. The United States District Court did not consider *McAndrews v. Thatcher* authority for treating, in such a case as *L'Amerique*, the expense of floating the vessel as general average. The case was not appealed, but on its special facts is doubtless correct, though some of the reasoning in the opinion is open to question.

In the interval between the decision in *McAndrews v. Thatcher* (*s*), and *L'Amerique* (*t*), the Supreme Court of the United States decided the case of *The Julia Blake* (*u*), in which emphasis was laid on

(*q*) 3 Wall. at p. 368.

(*r*) 35 Fed. 835.

(*s*) (1865), 3 Wall. 347.

(*t*) (1888), 35 Fed. 835.

(*u*) (1882), 107 U. S. 418.

the doctrine that the authority of the master to bind the cargo, in extraordinary emergencies, is limited to cases in which his action may reasonably be expected to be directly or indirectly for the benefit of the cargo, considering the situation in which it has been placed by the accidents of the voyage.

In *L'Amerique*, Brown, J., was called upon to consider the effect of the language above quoted from *McAndrews v. Thatcher*, in the light of the subsequent decision in *The Julia Blake*. Starting with the statement of Justice Clifford, in *McAndrews v. Thatcher* (x), that "no interest is compelled to contribute to the loss or expense, which was not benefited by the sacrifice," in substance he found that the expense of salving the ship, after the cargo was removed, exceeded, by two-thirds, the cost of unloading and delivering the cargo to its owners by lighters; and that, accordingly, the cargo's proportion of the subsequent salvage was so very much greater than the benefit which it would have received from the subsequent salvage, by having the ship's value preserved for contributory purposes, that there never could reasonably have been an expectation that the subsequent salvage operation on the ship would benefit the cargo. His findings amount, therefore, to holding that the voyage was in effect broken up by the stranding, and that the community of interests should be deemed to have ended, under the special circumstances, with the unloading of the cargo.

The case of *L'Amerique* does not lay down any fixed rule as to the line of demarcation between cases such as are referred to in the statement of Justice Clifford in *McAndrews v. Thatcher* (y), and that which was before the Court. No definite rule on the subject can be stated with confidence. The result of the decisions seems to be that when a vessel strands near her destination and her cargo is discharged and delivered at destination by lighters, or other similar means, the salvage and other extraordinary expenses up to the time of delivery of the cargo are general average, and the subsequent expenses of floating the ship are chargeable to the ship unless she is floated without much expense or delay after the cargo has been delivered. In the latter event all the extraordinary expenses are to be treated as general average.

In the judgment in *L'Amerique*, the Court further states that:

"after unloading, the subsequent work of forwarding the cargo to its owners in no way concerned the ship or its safety, but the cargo and freight only."

This seems distinctly wrong. The Court having decided that the unloading of the ship was a general average act, it seems clear that

(x) 3 Wall. at p. 369.

(y) *Ibid.*

the general average interest in that act cannot cease until the cargo is taken to a place of safety, which in this instance was its destination; and in practice this expense is dealt with accordingly.

Where not
continuous.

Where the services are not continuous and the property is saved by a different series of operations, after a separation of interests, the compensation of the last salvors is not general average to which all interests contribute (*z*).

General
wreck.

“In case of a general shipwreck, the essential principle of contribution is wanting, there being no voluntary act done for the common safety of the whole. Consequently, every man must take care of what belongs to him, and must endeavour by his own exertions to save it” (*a*).

Voluntary
salvors.

The compensation paid to voluntary salvors such as might bring a derelict into port, is not general average.

Specie.

Specie contributes to salvage (*b*) and general average on the same basis as does other cargo.

Credit for
ordinary
expenses
saved.

When the compensation of salvors is general average, a credit must be given for such ordinary expenses as would have been incurred, but have actually been saved by the salvage services.

The Association of Average Adjusters of the United States have a rule dealing with the subject (*c*).

EXTRAORDINARY EXPENDITURES.

2. Port of Refuge Expenses.

Principle.

The American law and practice on this subject is now to all intents the same as when laid down in *Campbell v. The Alknomac* (*d*). As there has been no change in this respect since Lowndes's Fourth Edition, his admirable summary of the subject may be appropriately repeated here (*e*).

“The American law is thoroughly consistent on the subject of port of refuge expenses. Recognizing the seeking of a port of refuge as a sacrifice for the common good, or general average act, it treats all the expenses occasioned thereby as the subjects of general average,

(*z*) *McAndrews v. Thatcher*, *supra*; *Pacific Mail S.S. Co. v. N. Y. H. and R. Mining Co.*, 69 Fed. 414; 74 Fed. 564 (*The City of Para*).

(*a*) *Caze v. Reilly* (1814), 3 Wash. 298; *Gourlie*, 391.

(*b*) *The St. Paul*, 82 Fed. 104; 86 Fed. 340; *The Mulhouse*, Fed. Cas. 9910.

(*c*) V. Where salvage services are rendered to a vessel, or she becomes disabled and is necessarily towed to her port of destination, and the expenses of such towage are allowable in general average, there shall be credited against the allowance such ordinary expenses as would have been incurred, but have been saved by the salvage or towage services.

(*d*) (1798), Bee, 124; Fed. Cas. 2350; *ante*, p. 719.

(*e*) Lowndes, 4th ed. p. 619.

and draws no distinction between the expenses of going in and coming out again. This is equally the rule, whether the damage to the ship which necessitated the seeking of the port, were the result of some other sacrifice, or of an accident. If, indeed, the vessel were to put into port merely to avoid contrary winds, no contribution would be due, this not being a sufficient danger; but if to avoid danger from a tempest the ship was judiciously taken into port, though herself intact, allowance should be made (*f*). If a ship goes into port for want of provisions or fuel, the expense is only treated as general average in case it is shown that the ship's original supply was sufficient, and that it had fallen short through some accident.

“ ‘The allowance in general average,’ says Gourlie, ‘is to be strictly limited to such charges as are a consequence of the putting in. Where the loss is in the nature of a second casualty, not contemplated, nor necessarily connected with the first step, then it is not general average (*g*). For example, if the ship is accidentally damaged by stranding, while attempting to enter a port of refuge, this damage would not be considered general average.’ On the other hand, it would seem that this principle would not govern the case of a distressed vessel, threatened by a storm, when the master knowingly braves the dangers of an unknown port, and is stranded while attempting the harbourage (*h*). ”

“ The cost of unloading, storing, and reloading cargo, Discharging cargo, &c. and the damage incident thereto, are treated as general average ” (*i*).

Where a vessel is moored in an open port and a storm or some other peril threatens the adventure, and for the general safety the vessel puts out to sea and subsequently returns, the wages and provisions Putting to sea to escape peril.

(*f*) *Lawrence v. Minturn* (1854), 17 How. 100; Gourlie, 241.

(*g*) Gourlie, 241.

(*h*) *The Star of Hope* (1869), 9 Wall. 203; Gourlie, 241—243.

(*i*) “ Gourlie, 278. This appears to be equally the rule whether the cargo is discharged for the common safety at the moment, as because it is not in safety in port while on board, nor the ship safe while it is there, or is merely discharged for the purpose of getting at the inside of the ship to repair accidental damage, the discharging being treated as a necessary part of the act of bearing up in order to effect such repairs. Here the law of America clearly goes beyond the principle laid down in our case of *Seendsen v. Wallace*, *ante*, pp. 197—214.

“ ‘Included therein,’ says Gourlie, *i.e.*, in the expense of discharging, treated as general average, ‘is the hire of men breaking out cargo in the ship, as well as the lighterage or transportation to the storehouse, the storage, warehouse rent, or hulkhire, the handling while in store, whether in tiering it up, or subsequently for

of the crew, or coal and engine stores, or other expenses thereby incurred are in practice treated as general average, the act being akin to putting into a port of refuge.

Removal to
another port
for repairs.

Where, after a vessel puts into a port of refuge and it is necessary to effect repairs, and there are no facilities at that port for handling the cargo or for making the repairs, the cost of taking the vessel to another port is treated as general average. If the cargo be discharged at the first port and the vessel is then taken to a second port, unless the damages to the ship were the result of a sacrifice, the cost of removing the vessel to and from the repair port, being for the benefit of the shipowner, is charged to the ship. When the repairs are of both a general and particular average nature, the expenses of removal are apportioned on the basis of the cost of the respective repairs. Wages and keep of the crew during this further prolongation are chargeable to general average on the ground that this delay is but an extension of that incurred from the moment of the voluntary departure from the course of the voyage (*k*). The reason a distinction is made under such circumstances between wages and port dues, or removal expenses, is that the latter are deemed to be akin to the towing of a vessel in a port of distress to the shipyard for repairs after the cargo has been discharged.

Charges on
passengers.

The charges incurred for the accommodation of passengers landed at intermediate ports in order that the ship may be repaired are for the account of the shipowner (*l*).

Substituted
expenses.

The American law on the subject of substituted expenses is still in an unsatisfactory condition. The number of such cases is constantly increasing, and the Courts do not seem disposed to assist in bringing about a solution of what all must consider to be a reasonable procedure. The theory of substituting a lesser loss for a greater is one

“its better preservation, the fire insurance premium, cost of watchman, agency commission for the care and custody of the merchandise discharged, any repair or replacement to packages, required because of damage received while handled; or, if by reason of the nature of the cargo, or because of the lack of facility for warehousing, it is not stored, then the cost of tarpaulins or other covering, where necessary for its protection; likewise the charges for reloading, and stowage in the ship, these being considered as expenses incurred in direct consequence of the act of deviation, and as a necessary result of the need of repair, and the completion of the adventure. If, however, the condition of the cargo requires the unloading and the repairs necessary to the vessel can be made without a discharge, the cost and expenses above enumerated are charged specially to the cargo. The storage and attendant expenses are general average only up to the time the continuation of the voyage remains in expectancy; when it is decided that it shall be broken up, the storage, &c. is charged entirely to the cargo.’ The decisions in the Courts which have authorized these conclusions are given in Mr. Gourlie’s notes.”

(*k*) Gourlie, 245.

(*l*) *Weston v. Train*, 2 Curt. 49; Gourlie, 239.

which should appeal to all interested in the common venture, and every encouragement should be given to the master or shipowner to act on that theory. Certainly the present state of the law, in some instances, affects the course followed.

In but one case in our Courts has this question been fully considered. That case was in the Courts of the State of Maryland, and it is a coincidence that such an important question should be involved in the only recorded decision on general average I can find to have been decided in the Maryland Courts.

The *Mary V. Hugg* (*m*), in the course of a voyage from Chili to Baltimore, sprang a leak in bad weather, and put into Rio de Janeiro. The surveyors recommended that "she be lightened, say 400 or 500 tons, and that the same be shipped to port of destination to avoid heavy cost of landing, warehousing and attendant expenses upon the same." Pursuant to this recommendation, 300 tons of cargo were forwarded to destination by another vessel, and the *Mary V. Hugg* proceeded to destination with the remainder of her cargo. The Court decided that these substituted expenses were not general average, but a charge on the freight so far as that would pay it, and if there was any balance it was a charge on the cargo.

The Court quoted, with approval, the following words of Lord Blackburn in *Wilson v. Bank of Victoria* (*n*):

"But, passing by this, we think that the expenses actually incurred must be apportioned according to the facts which actually happened, and that there is no legal principle on which they can be apportioned according to what might have been the facts if a different course had been pursued."

The Court's conclusion was based largely on the statement of law that if the ship was irreparable, the expense of forwarding the cargo was not general average, and, therefore, the forwarding of a portion of the cargo must be governed by the same principle.

In another case (*o*), the steamer *Earnmoor*, bound to St. Thomas from Philadelphia, with a cargo of coal, struck a rock in the Delaware River and, to prevent sinking, was run ashore. She was floated after lightering a portion of the cargo, and taken to Wilmington. It was evident that the subsequent repairs to the vessel would occupy considerable time. A survey was held and it was recommended that, in order to avoid greater general average expenses, the voyage be abandoned. By agreement between ship and cargo, to which many of the underwriters on both were parties, the cargo was sold and the

(*m*) *Hugg v. Baltimore and Cuba S. and M. Co.* (1872), 35 Md. 414.

(*n*) L. R. 2 Q. B. 203; 36 L. J. (Q. B.) 89.

(*o*) *Earnmoor S.S. Co. v. New Zealand Ins. Co.*, 73 Fed. 867.

loss on freight and cargo resulting from the sale was allowed in general average. An underwriter, who was not a party to the agreement, contended that the loss of freight and cargo resulting from the sale were not general average, and the United States District Court took that view of it. The reasoning of the opinion is very unsatisfactory, the only reference to the doctrine of substituted expenses being a statement to the effect that the sale of cargo as a matter of convenience and from prudential reasons merely, will not be sufficient to make the payment of freight a general average charge.

On the other side of the question we have the following:

In an opinion of Addison Brown, J., one of our most learned judges in such matters, in a case (*p*) where allowance was made in general average for the extra cost of docking cargo when the ship was placed in dry dock for repairs with her cargo on board, he used this language:

“If upon such facts the case is entitled to be treated like one arising in a port of refuge in order to make necessary repairs of damages caused by a sea peril, then, according to the law of this country, the docking of the cargo as an expense substituted in place of unloading and re-loading, would be a general average charge as well as merely temporary repairs of the ship.”

In another case, the vessel was bound to Chicago with a cargo of lumber. She was damaged in a collision and put into Mackinaw, where she discharged the deckload, made slight repairs, and was towed to Milwaukee, the nearest port of repair, and thence by another tug to Chicago. The Court held that the entire expense was general average (*q*).

In considering this subject, the language of Willes, J., and Clifford, J., is appropriate (*r*).

The test applied in the *Mary V. Hugg* case (*s*) does not seem sound in principle. In the case of the irreparable ship the object to be attained was to get the cargo to destination; whereas, in the case before the Court the forwarding of part of the cargo was to save the general interests the greater expense of landing, warehousing, &c.

The whole doctrine of general average is based on the theory of the substitution of a lesser loss (the sacrifice) for a probable greater (accidental) loss. In the case of the substituted expenses the lesser loss equally takes the place of a larger loss which would have been general average, if incurred. On the principles of equity, which

(*p*) *Bowring v. Thebaud*, 42 Fed. at p. 796.

(*q*) *Goodwillie v. McCarthy* (1867), 45 Ill. 186.

(*r*) *Ante*, p. 736.

(*s*) *Ante*, p. 757.

the Courts have ever recognised as underlying the doctrine of general average, the substituted expenses in such circumstances should be general average. If it also saves expenditures other than those which would be general average, it should necessarily be apportioned on the basis of the expenditure saved.

The injustice of the rule laid down in the *Hugg* case is more apparent in the event of a transshipment, under the same circumstances, of part of the cargo of a ship loaded with general cargo on which the freight is all prepaid. The result of the master's selection of the cargo to be transhipped for the general benefit would be that under this rule the owners of the cargo selected would pay the expenses, and the owners of other cargo would avoid them.

In this connection it is interesting to note that in a case of voluntary stranding (*t*) the jury were charged, among other things, that if it were found that the master's act was to save the ship and cargo from the *increased expense* of raising the ship in deep water, the act was general average. The Court's charge was approved by the United States Supreme Court.

The question has never been considered by any of the Federal Appellate Courts, but I feel quite confident that, when it is considered, substituted expenses will be recognized as general average, when the expenses saved would be general average. An analogous rule of damages, in another branch of the maritime law, has been approved by the Circuit Court of Appeals (*u*).

In practice the doctrine of the *Hugg* case is not always followed. I have known of several cases where, in order to float a stranded vessel, cargo has been discharged into lighters, or into another vessel, and, to save the heavier expense of reloading, the lighters or vessel containing the discharged cargo have taken it to destination. This expense has been allowed in general average without question by the parties interested.

Owing to the present unsettled state of the law it is advisable to obtain the agreement of the parties interested before adopting a substituted course. This frequently causes delays and expenses which, if the law were clear, might be avoided. I might say that American underwriters readily give their assent to such procedure when the course suggested is reasonable and beneficial (*w*).

The quarantine dues on the ship are general average, but hospital charges for sick seamen are not (*x*).

Hospital charges.

The wages and provisions of the crew are general average from the time of deviation for the port of distress until the ship sails again bearing away, &c.

Wages and provisions, bearing away, &c.

(*t*) *Fowler v. Rathbones*, 12 Wall. 102.

(*u*) *Ronalds v. Leiter*, 109 Fed. 905.

(*w*) See *Shoe v. Craig*, *ante*, Addendum.

(*x*) *Hathaway v. Sun Ins. Co.* (1861), 8 Bosw. 33; *Gourlie*, 240.

on the voyage (*xx*), but not until she reaches the position from which she deviated.

Wages and keep of cattlemen.

The wages and keep of cattlemen not on the ship's articles are not in practice allowed in general average.

Wages and provisions if voyage abandoned.

If the voyage is abandoned, the wages and provisions are general average only up to the date when the voyage is broken up (*y*).

While stranded.

If the ship is accidentally stranded, the wages and keep of the crew during the detention on shore are not as such the subject of general average. If she was voluntarily run ashore for the common safety, the crew's wages and keep during the detention are the subject of general average (*z*). If the vessel, while stranded, becomes a general wreck and the crew are retained to assist in saving property, the property saved must contribute to the wages and keep of the crew (*a*).

Scale for allowance.

Gourlie (*b*) gives a scale for the allowance of provisions.

Recently, our Average Adjusters' Association, after full inquiry, adopted a scale which in practice is now used (*c*).

York-Antwerp Rule XI.

The question has arisen as to the construction of York-Antwerp Rule XI., which deals only with the wages and maintenance of the crew while the ship is detained in a port or place, and does not mention the period between the time of deviation and arrival at the port or place. It has been contended that, as the United States law allows the wages and provisions during the deviation, by virtue of York-Antwerp Rule XVIII. the wages during that period should be allowed. The better opinion, however, is that Rule XI. is intended to deal with the whole subject of the allowance for wages and provisions of the crew, and in practice no allowance is made during the period of deviation.

(*xx*) *Campbell v. Alknomac*, Bee, 124; Fed. Cas. 2350; *Star of Hope*, 9 Wall. 203; *Hobson v. Lord*, 92 U. S. 397; Gourlie, p. 294, and cases cited.

(*y*) *The Joseph Farwell*, 31 Fed. 844; Gourlie, 312.

(*z*) Gourlie, 307, and cases there cited.

(*a*) *Roberts v. The Ocean Star*, Fed. Cas. 11908; *Bridge v. Niagara Ins. Co.*, 1 Hall, 467.

(*b*) Pp. 599, 601.

(*c*) XII. "ALLOWANCE IN RESPECT OF PROVISIONS.—When allowance is made in general average for provisions of master, officers and crew the allowance shall be on the following scale:—

Master	\$1.00 per day.
Officers and Engineers .....	.75 „ „
Crew .....	.50 „ „

This rule shall apply to the Atlantic Coast ports of the United States and to ports in the Gulf of Mexico."

On the Pacific Coast the scale is:—

Master	\$1.50 per day.
Officers and Engineers .....	.75 „ „
Crew .....	.40 „ „

In practice, the wages and provisions of the members of the crew who are solely connected with the passenger department are not allowed in general average. In applying the York-Antwerp Rules they are allowed on the ground that the men employed in the passenger department are part of the crew and that the rule makes no distinction.

Wages and provisions of crew, passenger department.

The right to allowance in general average for wages and provisions is not dependent on a deviation. A voluntary *interruption* is the test. Where a vessel was damaged on her way to a port of call, to which she was going for a clearance, and was necessarily detained at the port of call to effect repairs, the Court held that the wages and provisions during the detention were general average (*d*). The same conclusion was reached where a vessel was detained at sea, while constructing a jury rudder (*e*) to replace one sacrificed.

When no deviation.

Coal and engine stores used up in bearing away for a port of distress, and while there, excepting such as are used solely in connection with repairs, are in practice treated as general average. There has been no decision of our Courts dealing with this subject, but the principle governing the allowance of wages and provisions of the crews seems applicable to the coal and engine stores, and I have never known the right to make the allowance disputed. Allowance is also made when the York-Antwerp Rules govern the case.

Coal and engine stores.

The expenses of the owners sending a special agent to a port of distress are general average when such procedure is reasonable and his services are for the general benefit (*f*), but when after arrival the special agent's services are largely for the benefit of any particular interest, such as looking after repairs to the ship, only such portion of his charge as applies to the services for the general benefit are general average (*g*).

Special agent sent to port of distress.

In practice a commission of $2\frac{1}{2}$ per cent. is allowed on the general average disbursements for advancing or for retiring drafts (*h*).

Commission on disbursements.

Interest is allowed on the general average disbursements (*i*) and allowances (*k*). This interest is allowed at the legal rate prevailing at the place of adjustment.

Interest.

The Average Adjusters Association have a rule dealing with this subject (*l*).

(*d*) *Hobson v. Lord*, 92 U. S. 397.

(*e*) *May v. Keystone Yellow Pine Co.*, 117 Fed. 287. See *contra*, *Brig Mary*, 1 Sprague, 51; Fed. Cases, 9188.

(*f*) *Hobson v. Lord*, 92 U. S. 397.

(*g*) *Besse v. Hecht*, 85 Fed. 677; *The Eliza Lines*, 102 Fed. 184.

(*h*) Goulrie, p. 429.

(*i*) *Sims v. Willing*, 8 Ser. & R. 103.

(*k*) *Brig Mary*, 1 Sprague, 17.

(*l*) RULE II. Where allowances, sacrifices, or expenditures are charged or made

On the Great Lakes a distinction is made by some adjusters and underwriters as regards the allowance of commission on disbursements and the commission for collecting and settling the general average. Where the vessel has what is termed on the Lakes a package cargo (general cargo), the allowance is made. Where she has a bulk cargo, such as ore or grain, no allowance whatever is made. This distinction is clearly unwarranted. The principles of general average and the method of adjustment cannot be affected by the nature of the cargo, or the question as to how many are going to contribute. The charge of commission for collecting and settling the general average (*m*) is now so well established as a matter of law, that the subject is no longer open for discussion.

COST OF RAISING FUNDS.

In case the master of a vessel is not supplied with funds sufficient to defray the expenses at a port of distress, or on application to the owners of the vessel or cargo obtains no relief, and raises the funds by a bottomry or *respondentia* bond, or as a last resort sells a portion of the cargo, then the interest required for the forced loan, with other charges, such as exchange, commissions, &c., or the loss resulting from the sale of the cargo, is apportioned under the name of Cost of Funds, *pro ratâ*, over the different items of disbursement; and such proportion as falls on the general average charges is included in the contribution (*n*).

As these cases are now of so rare occurrence, I do not consider it necessary in this summary to deal with the law governing the master's right to raise funds under bottomry or *respondentia*, or to sell cargo for that purpose. Since the last edition of this book there has been no decision in the United States Courts in which there is any important change in the law on these subjects. There is, however, one decision of the United States Supreme Court, which I deem worthy of mention.

The holder of a bottomry bond on vessel and cargo, given to cover the expenses incurred at a port of distress, largely for the repair of the ship, proceeded against the cargo for the uncollected balance, after seizure and sale of the vessel. The Court, in its judgment, exhaustively considered the right of

good in general average, interest shall be allowed thereon at the legal rate prevailing at the place of adjustment.

(*m*) *Barnard v. Adams*, 10 How. 270; *Sturges v. Cary*, 2 Curt. 59.

(*n*) *Goutlie*, p. 357, and cases there cited.

the master to pledge the cargo for expenses for the ship's benefit, when a cheaper course could have been adopted by forwarding the cargo to destination; and emphasized the salutary rule that the master cannot sacrifice the cargo's interest for the ship's benefit, and declared the bond invalid so far as concerned the cargo (o).

ADJUSTMENT: PLACE AND TIME OF.

Apparently, the law as to the place and time of adjustment is the same as it is in England; that is to say, ordinarily, when the voyage is completed, the port of destination is the proper place, and the adjustment should be prepared as soon as possible after the completion of the voyage (p). In speaking of the place of adjustment, I refer to the law and rules which should govern it, as it is immaterial where the adjustment is made if it is made promptly and conforms to the laws and rules of the port of destination when the voyage is completed, and is issued in the language prevailing there. It may be of interest to note that a few years ago several average statements on Italian steamers, bound to this country, were prepared in Italy and issued in the Italian language and sent here for collection, but the cargo interests declined to consider them until the shipowners had them translated into English. Ordinarily, when the voyage is completed, and there are competent adjusters at the port of destination, it is more convenient to have the statement actually prepared there, because, obviously, the adjuster at that place is more familiar with the law and practice of his own country than another elsewhere would be.

Where the voyage is broken up at an intermediate port, and the cargo is either sold or delivered to its owners, it has been decided that the general average is governed by the law shown to exist there (q), but under the same circumstances, if the foreign law is not proven in Court, our Courts will apply our own law and usages (r).

Where
voyage is
broken up.

If a vessel is condemned at a port of refuge, and the master or owners forward the cargo to destination, collect freight and obtain

(o) *The Julia Blake*, 107 U. S. 418.

(p) *Peters v. Warren Ins. Co.*, 3 Sumner, 393; S. C.; *Strong v. Fireman's Ins. Co.*, 11 Johns. 323; *Barnard v. Adams*, 10 Howard, 270.

(q) *National Board of Marine Underwriters v. Melchers*, 45 Fed. 643; *The Eliza Lines*, 102 Fed. 184.

(r) *Olivari v. Thames and Mersey Marine Ins. Co.*, 45 Fed. 894.

Ship with
cargo for
more than
one port.

average security at destination, the law of the place of destination must govern the general average statement (s).

When a ship has cargo for two or more ports in different countries or with different laws of average, the case presents some difficulty, and here, as in England, there are no decisions to indicate what law should govern. Some authorities argue for the first port and others for the last. In this country, the owners of cargo for the first port, entitled to general average contribution, may take proceedings at that port against the ship and the remainder of the cargo for contribution, and can obtain security before the vessel resumes her voyage. In such case, the law of the first port would be applied, and on the vessel's arrival at the final port in this country, our Courts by comity would recognize the judgment of the other Court; but where such proceedings are not taken at the intermediate port, the weight of opinion is that the law of the respective ports should be applied to the settlements with the cargo destined to them.

Take for instance, the case of a vessel bound first to a French port and afterwards to a United States port; it does not seem reasonable that, because the shipowner had the liberty or option of stopping at the French port, this fact should operate to cast the burden of a French adjustment on an American consignee. The liberty in the bill of lading to stop at the way port was simply an option for the ship's benefit and to relieve it from liability for deviation, and it is unreasonable to construe such liberty as changing the voyage contracted for into a series of independent voyages so as to alter the law of the contract as respects general average, a wholly independent subject. It is argued that after the vessel delivers her cargo at the first port the values may change because of another accident. As a protection against such an occurrence, the shipowner, who, so far as concerns the cargo for the last port, has exercised the option of going into the first port for his own benefit, may take out insurance against an increase of contribution arising from diminution of values by a subsequent accident, and such insurance is now quite customary in the United States.

In 1902, in the case of the French steamer *Jeanne Conseil* with cargo, on a voyage from Bordeaux to St. Pierre, Miquelon (French) and New York, the vessel broke her shaft and was towed into the Azores. In the average statement, prepared at New York, the St. Pierre cargo was assessed general average on the basis of the French law, and the New York cargo on the basis of New York law, which

(s) *Barnard v. Adams*, 10 How. 307, U. S. Sup. Ct.; *McLoon v. Cummings*, 75 Penn. S. T. Rep. 98; *Bradley v. Cargo of Lumber*, 29 Fed. 648.

was the method adopted in a case mentioned by Lowndes (*t*). The question as to the correctness of this procedure was submitted to leading counsel (two former Judges of the United States District Court at New York) who approved the method adopted.

On account of the differences over this question, many steamship lines, when vessels are bound to various ports, now provide in their bills of lading that the average statement shall be made in accordance with the laws and customs of the port of shipment.

ADJUSTMENT.

General Principles Governing Allowances and Contributory Values.

The principles governing the allowances in general average and the contributory values are the same, the theory being that the one whose property is sacrificed shall be placed in exactly the same position as he would be in if the property of another had been selected for the sacrifice, and it is for this reason that amounts made good in general average contribute to general average. As Gourlie states (*u*):—

“General average contribution seeks to restore to one whose property has been sacrificed for the common good that which has been so lost to him.”

This statement is subject to limitations; such as, for instance, the non-allowance of deckload jettison when it was not carried in accordance with the custom of the trade, although it was sacrificed for the common good. In determining the value to be made good, the element of peril existing at the time of sacrifice is not considered, for the reason that the same peril and the chances of safety equally existed for the rest of the adventure (*x*).

Amounts to be Made Good.

The practice in the United States in respect to this is the same as when Gourlie's book was written. Where repair is made by the substitution of new material, one-third is deducted as representing the betterment that the ship has received. This deduction is made from the cost of labour and materials employed in the repairs, from the towages to and from dry dock, dry dock dues and all the incidental expenses connected with the repairs other than surveys (*y*). The deduction is also made even if the ship is upon her first voyage (*z*).

Deduction of one-third new for old.

(*t*) 4th edit. 274; *supra*, p. 316.

(*u*) P. 462.

(*x*) Gourlie, 465; *Rogers v. Mechanics Ins. Co.*, 2 Story, 173.

(*y*) Gourlie, 468, and cases cited.

(*z*) *Dunham v. Com. Ins. Co.* (1814), 11 Johns. C. 315.

No deduction is made from the cost of straightening bent iron-work or where new material is not used. Neither is it made when articles sacrificed are replaced by the purchase of articles that are not new, nor when ropes and materials sacrificed are perfectly new; that is, when taken fresh from the ship's storehouse and sacrificed before they have been put to their ordinary use. In practice the same deduction is made in the case of iron and steel vessels, and the injustice of this is quite manifest, and has been frequently commented upon. Gourlie's expectations that there would be a modification in this respect have not yet been realized (*a*). The legal decisions on this subject were prior to the advent of iron and steel vessels. While the rule is arbitrary, in the long run it would probably work justice in the case of wooden vessels, but it does not do so as regards iron and steel vessels.

A good illustration of the unfairness of the practice at present is where an iron or steel vessel is drydocked on account of voluntary stranding damage, and some of her bottom plating is found to be bent, and is straightened. Under those circumstances, the entire cost of the repairs is allowed in general average without deduction. If, however, it developed that the plating was broken and had to be replaced by new, one-third would be deducted from the entire cost of the repairs, including drydock dues, &c., although the cost of the new material was very much less than the thirds deducted from the total account. Presumably, the ship that had the broken plates was the more seriously damaged, and it seems an absurdity that in that instance the allowance in general average should be less than that made in the case of the ship that sustained the least damage, viz., the ship with the bent ironwork. As a distinction has always been recognized in regard to anchors (*b*), why should it not be made in the case of iron and steel vessels? It is to be hoped that the practice will be altered in this respect.

Dry dock
dues, &c.

If the repairs are of both a general and particular average nature and it is necessary to drydock the vessel to effect same, one-half of the cost of taking the vessel to and from drydock in the port of repair, and one-half of that portion of the drydock dues which is common to both classes of repairs, are in practice treated as general average.

Credit for old
materials.

The practice of deducting a credit for old materials before the deduction of the one-third has in recent years been changed. The credit is now made after the deduction of the one-third, which is correct in principle.

Where vessel
lost after
completion of

If, after the voyage has been completed, the ship should be lost before the sacrifices have been replaced or repaired, allowance should

(*a*) P. 470.

(*b*) Gourlie, 468.

be made in general average for the cost of replacing or repairing the sacrifices on the basis of estimates. Similarly, allowance should be made for damage to cargo through a sacrifice, although the cargo was destroyed after delivery.

voyage and sacrifices not replaced.

The allowance for cargo sacrificed and the contributing value of cargo are based on the market value at the port of destination at the time of arrival. In practice the value is taken as of the last day of discharge. It has been argued by some writers that it should be taken as of the first day of discharge, but, as the community of interest between ship and cargo is finally separated on the last day, the weight of reason is in favour of that date. In this connection it is well to remember that in contribution in general average to salvage expenses no preference is allowed on account of some consignments of cargo being delivered in advance of others (*c*).

Amount allowed for cargo sacrificed.

If goods jettisoned were either damaged at the time, or certain to become damaged before the end of the voyage (as, for instance, if the ship after being relieved by jettison was subsequently sunk or filled with water, and it is certain that damage would have been received by the sacrificed goods had they not been sacrificed), only the value which it is assumed this merchandise would have produced if it had not been jettisoned and had stood the vicissitudes of the voyage, is to be allowed (*d*). In this event, if similar goods are damaged, the amount allowed for the sacrificed goods is in practice based on the damaged value of the goods that arrive. As Gourlie states (*e*), "The claim for contribution is a favoured one, and, the cargo being sound when sacrificed, no mere presumption will be allowed to destroy the owners' right to an indemnity based upon a full, sound value; but the nature and circumstances of the damage may be such that the extension of such damage to the sacrificed goods had they remained aboard becomes no longer presumption but almost a question of certainty."

Deduction from jettison for damage.

Where fruit, or other perishable cargo, is jettisoned, and at the time of its jettison is in good condition, but if it had not been jettisoned it would certainly have become worthless before it could arrive at a market, no allowance is made. Such cases are quite frequent in the United States with vessels carrying bananas.

Perishable cargo.

If, after jettison, the ship returns to her loading port, and the jettisoned goods are there replaced, the loss by jettison consists of the cost of replacing the goods jettisoned. That sum, therefore, and not the market value at destination, should be made good, as the loss of goods has thereby been converted into a loss of money (*f*).

If replaced at loading port.

(*c*) See p. 739.

(*c*) P. 481.

(*d*) Gourlie, p. 480.

(*f*) Gourlie, 480.

No allowance for packages on fire when wetted.

Nor when jettisoned.

Freight when prepaid included in value of goods.
Allowance for freight.

When cargo is damaged by water poured into the hold to extinguish a fire, allowance is made for the damage to those packages only which were untouched by fire at the time the water was thrown on them (*g*). If the goods damaged by water were also damaged by smoke deduction is made for the latter.

Where the goods on fire are thrown overboard no allowance is made for them (*h*), but burnt packages which are no longer on fire, are, if jettisoned, allowed for at their estimated value.

If the freight is absolutely prepaid, or the cargo is obligated to pay it in any event, the freight is included in the amount allowed for the goods sacrificed (*i*).

Contribution is made for freight lost as a consequence of a general average sacrifice (*k*).

No allowance is made for freight on cargo sacrificed if it be a fact that even if the sacrifice had not been made the voyage could not have been completed and the freight earned. Otherwise the shipowner would be a gainer by the sacrifice. If the cargo sacrificed could have been forwarded to destination, and the cost of forwarding would have been less than the original freight, the allowance in general average is for that difference.

If after jettison or sacrifice of cargo the vessel engages new cargo and fills the empty space created by the sacrifice, and completes the voyage she was then on, the net freight received on the new cargo, after deducting the expenses of engaging and loading, is a credit against the allowance for freight on the cargo sacrificed, but if the voyage is abandoned no credit is made on account of the earnings of the next voyage.

Basis of allowance for freight.

The allowance for freight on cargo sacrificed is based on the bill of lading rate, or, if a bill of lading be not issued, on the rate as per charter. It was the custom formerly to allow the gross freight, without any deduction for the expense of earning it, although the contributory value of freight to general average was based on a proportionate part of the freight. The propriety of making the allowance on the basis of the gross freight was litigated in several cases, but the Court felt bound by the custom or usage (*l*). The

(*g*) *Nimick v. Holmes*, 25 Penn. St. R. 366; *Nelson v. Belmont*, 12 N. Y. Sup. Ct. 310; *Gourlie*, p. 482.

(*h*) *Slater v. Hayward Rubber Co.*, 26 Ct. 128; *Lee v. Grinnell*, 12 N. Y. Sup. Ct. 400; see *Gourlie*, p. 155.

(*i*) *Gourlie*, p. 488; *Maldonado v. B. & F. Mar. Ins. Co.*, 182 Fed. 784.

(*k*) *Nathl. Hooper*, 3 Sumner, 543; *Mutual Ins. Co. v. Cargo Brig George*, Olcott, 89.

(*l*) *Nathl. Hooper*, 3 Sumner, 542; *Columbian Ins. Co. v. Ashby*, 13 Peters, 331; *Mutual Ins. Co. v. Cargo Brig George*, Olcott, 89.

unfairness of the usage was, however, manifest, and finally, in the case of *Christal v. Flint* (*m*), the Court approved the allowance of gross freight as being in accordance with the usage and after pointing out the inequity of the practice, expressed the opinion that this usage of adjusters should be altered. The result of this intimation from the Court was the adoption of a rule by the Average Adjusters Association of the United States (*n*).

Interest is allowed in general average on all allowances and disbursements (*o*). Interest on cargo sacrificed.

CONTRIBUTORY VALUES.

The sacrifice is to be made good by the different interests in proportion to the share of each in the adventure. Principle governing.

As a matter of principle, the true contributory value of any interest is the value saved by the sacrifice; that is, the property must contribute according to its value at the time and place at which the contribution becomes due. Contribution for loss by jettison or other sacrifice is contingent upon something finally coming to the use and within the control of the owner, not merely by the temporary success attained by the act, but by the ultimate possession of the property (*p*).

I dissent from the statement of Gourelie that "expenditures are due absolutely, regardless of the subsequent fate of the interests for whose benefit they were made" (*q*), and have already expressed my conclusions on this subject (*r*).

The authorities cited by Gourelie for the proposition quoted are *Spafford v. Dodge* (*s*), and *Douglas v. Moody* (*t*). In both these cases contribution was sought in respect of expenses incurred in obtaining the release of captured vessels and cargoes.

So far as this point is concerned, opinions to the effect above quoted were expressed by the judges who wrote the judgments, but since, in both cases, the ships and the cargoes arrived safely at destination, the statements obviously are merely *dicta*. In neither case

(*m*) 82 Fed. 472.

(*n*) RULE IV.—LOSS OF FREIGHT ON CARGO SACRIFICED.—When loss of freight on cargo sacrificed is allowed in general average, the allowance shall be for the net freight lost, to be ascertained by deducting from the gross freight the expenses that would have been incurred subsequent to the sacrifice to earn it.

(*o*) *Ante*, p. 761.

(*p*) Gourelie, p. 521; *Lee v. Grimell*, 12 N. Y. Sup. Ct. 400; *Barnard v. Adams*, 10 How. 270, 370; *The Star of Hope*, 9 Wall. 235; *Hobson v. Lord*, 92 U. S. 397.

(*q*) Gourelie, p. 521.

(*r*) *Ante*, pp. 727—729.

(*s*) (1817), 14 Mass. 66.

(*t*) (1813), 9 Mass. 548.

was the Court called upon to decide, nor did it decide, that contribution for expenditures made at a port of refuge is due absolutely in case of the subsequent total loss of the property. So far, therefore, as the actual decisions in these cases are concerned, they are not authority for the proposition that any greater liability exists to contribute for extraordinary expenditures than for sacrifices.

The case of *Spafford v. Dodge* no doubt did decide the point stated by Gourlie that, "legally, then, there are two rules of valuation, the one applicable to cases of expenditure, the other to sacrifices of property" (*u*), but the ruling in *Spafford v. Dodge*, and the *dictum* to the same effect in *Douglas v. Moody* (*x*), that contribution for extraordinary expenditure should be made on the basis of the values at the port of expenditure, are at variance with the decisions in the State of New York and in the Federal Courts, and must, therefore, be deemed to be overruled on this point (*y*).

Contributory
value of ship.

In the early days, in some of the states, it was usual to take as the basis of the ship's value, not her full value, but some fraction, *e.g.*, in New York State four-fifths (*z*). This suggests the continental origin of our early law. Now, however, the law and practice is that the vessel contributes to general average on the basis of its value upon arrival at the port of discharge in its then condition.

The following statement of Gourlie fully covers the subject (*a*):—

"The vessel is to be valued upon arrival at the port of discharge in her then condition.

"From the value thus ascertained is to be deducted the cost of any repairs or other work done subsequent to the sacrifice for which contribution is sought; addition then being made of any allowances to the vessel in general average for sacrifices of ship's material."

Cargo.

When cargo is delivered at destination it contributes on the basis of the gross wholesale selling market value in its landed condition. From that value is deducted the freight, if it is not absolutely prepaid or must be paid in any event, and the landing charges and brokerage, if paid, and cash discount, if any. The value is also diminished by any special charges incurred in consequence of damage. The value of the cargo, as previously explained (*b*), is

(*u*) Gourlie, p. 522.

(*x*) 9 Mass. 548.

(*y*) *Lee v. Grinnell*, 12 N. Y. Sup. Ct. 400; *Barnard v. Adams*, 10 How. 270; *The Star of Hope*, 9 Wall. 235; *Hobson v. Lord*, 92 U. S. 397, 405—411.

(*z*) *Leavenworth v. Delafield* (1804), 1 Caines, 573.

(*a*) Gourlie, pp. 522, 523.

(*b*) *Ante*, p. 767.

taken as of the last date of discharge. Sales to arrive are not considered (*c*).

Where the voyage is broken up and the general average is adjusted as of the port of refuge, the value there is used, and, in practice, unless the cargo is sold at the port of refuge, it is assumed to be the value at the port of destination less the cost of forwarding. Where
voyage
broken up.

Frequently the cargoes of regular line steamers in the coasting trade consist of several thousand small shipments, which merchandise is not intended for wholesale distribution. In such cases it is the custom to base the contribution on the invoice value, including prepaid freight and shipping charges, if any. Where the goods are staples, such as cotton and lumber, the market values at destination are readily obtainable, and they are used. Coasting
trade and
outward
foreign
voyages.

Many averages are stated in America on vessels bound to ports in the West Indies, Central and South America and the Far East, where the obtaining of accurate market values is difficult. In such cases it is the practice to assume the market value to be invoice value plus 10 per cent. for profit; to this is added prepaid freight and shipping charges. If the goods are staples, such as cotton, sheetings, and case oil, market values are obtainable and are used. If the goods are manufactured for a special order, such as machinery and railroad material, invoice value, shipping charges and prepaid freight are used as representing the actual value, and this practice is generally approved.

The rough-and-ready practice still exists of deducting from the freight a certain percentage, varying in the different states (*d*), to cover such expenses of earning it as were incurred subsequent to the general average act. This practice is indefensible on any principle of general average. Gourlie says that, while it cannot be regarded as strictly equitable, it certainly has the merit of practicability and convenience. Freight.

It is our daily practice to calculate the contributory value of freight under the York-Antwerp Rules, and we have not found that

(*c*) Gourlie, 564.

(<i>d</i>) Maine	one-third.	South Carolina	one-third.
New Hampshire	,,	Georgia	one-half.
Massachusetts	,,	Florida	,,
Rhode Island	,,	Alabama	,,
Connecticut	,,	Louisiana	one-third.
New York	one-half.	Texas	one-half.
Pennsylvania	one-third.	California	,,
Delaware	,,	Ohio	,,
Maryland	,,	Illinois	,,
Virginia	one-half.	Michigan	,,
North Carolina	,,	Wisconsin	,,

On the Great Lakes the custom is to deduct one-half, regardless of the State to which the vessel is bound.

method impracticable or inconvenient. As Lowndes says (*e*), a uniform deduction of a percentage does not even roughly approximate to a correct result. The sacrifice might happen at the beginning of the voyage when, if the net value is determined scientifically, there will be little to contribute; or at the end of the voyage, when the deduction to be made would be very little. Our Courts have supported this rule solely on the ground of its being the usage. It is to be hoped that in the near future the practice will be changed.

Freight contributes to general average on the basis of the bill of lading freight collectible at destination on cargo on board at the time of the general average act. In the absence of any provision in the bill of lading, it is at the rate as per charter-party.

Freight prepaid.

Freight prepaid absolutely, or payable by the cargo, in any event, contributes in the value of the cargo, without deduction (*f*).

Chartered freight.

As regards chartered freight, we are no farther advanced than we were at the time of Gourlie's book.

There are no decisions of our Courts covering the question when the vessel is under charter and proceeding in ballast, and it is not the practice in those circumstances to make the chartered freight contribute to general average, differing in this respect from the law in England.

In 1905, a proposed rule was considered by our Average Adjusters Association, which provided that the chartered freight was to contribute when the vessel was in ballast, but after a full discussion the proposed rule was unanimously voted down.

The case of the *Brig Mary* (*g*) is often mentioned as authority for the contribution, but I think it is readily distinguished from the case of a vessel in ballast. In the case of *The Mary*, the vessel was chartered for a round voyage and carried cargo out and home, and the payment of freight was predicated on the return to the home port, being to all intents and purposes the same form of charter as is now frequently employed by which a vessel for a fixed lump sum carries cargo to various ports, the lump sum being paid upon the discharge at the final port, in which event if a general average had arisen at any stage of the voyage where cargo is on board, the entire freight would contribute. This is an entirely different state of affairs from that where the vessel is in ballast and the charter may be speculative, or, through the exercise of some option in the charter-party after the general average had arisen, the charter may never be entered upon (*h*).

(*e*) 4th ed. p. 633.

(*f*) *Maldonado v. B. & F. Mar. Ins. Co.*, 182 Fed. 744; Gourlie, p. 538.

(*g*) 1 Sprague, 17.

(*h*) The reasons underlying the American practice of confining the contribution

If the shipowner's freight is less than the bill of lading freight, for convenience in stating the contributing interests the bill of lading freight is frequently divided between shipowner and charterers.

While the general rule is that amounts made good contribute to general average, there is one exception in regard to freight which is worth mentioning. In stating the contributory value of freight under York-Antwerp Rules, it is the practice to add the amount made good for freight to the amount of freight collectible at destination, and then to deduct the wages, port charges, &c. The result in some instances is that where the vessel is making an expensive voyage with a small freight list the expenses deducted exceed the freight collectible and the amount made good, and there is no contribution. The reason for this is that if the amount made good contributed regardless of the deduction for expenses, the shipowner would not be in as good a position as he would have been if the property of another had been sacrificed.

Contribution
of amount
made good
to freight.

Passage money does not in practice contribute to general average for the reason that it is prepaid. There are no decisions in the United States on the subject.

Passage
money.

Merchandise or stores, the property of the Government, contribute to general average the same as does other cargo (*i*).

Government
property.

When there are two general averages on the same voyage the practice is to apportion the second general average first on the basis of the arrived values, and the proportions of general average thus determined are deducted from the contributory values of the first general average.

When two
general
averages
on same
voyage.

REMEDY AND EFFECT OF LIEN.

A claim for general average is enforceable in equity proceedings (*k*), or by a suit *in personam* in admiralty; it may also be enforced at common law when the proceeding is under an average bond or agreement (*l*).

The shipowner has a lien on the cargo for general average, and the owner of goods sacrificed has a lien against the vessel and other interests for the amount due him; both liens are enforceable in admiralty (*m*).

to the freight on the cargo on board are fully set out in the Report of the Association of Average Adjusters of the United States for 1905.

(*i*) *U. S. v. Wilder*, 3 Sumner, 308. See cases cited by Gourlie, p. 582.

(*k*) *Sturges v. Cary*, 2 Curt. 59; *Mitchell Trans. Co. v. Patterson*, 22 Fed. 49; *Dupont v. Vance*, 19 How. 162; *Bark San Fernando v. Jackson*, 12 Fed. 341.

(*l*) *Wellman v. Morse*, 76 Fed. 573; *Marwick v. Rogers*, 163 Mass. 50.

(*m*) *Ralli v. Troop*, 157 U. S. at p. 400; *Dupont v. Vance*, *supra*; *Wellman v. Morse*, *supra*.

The lien on cargo depends upon possession, and is lost by delivery to its owner, or consignee (*n*), but if properly reserved it would follow the goods (*o*).

Average
security.

The questions of security for general average, right of lien, and the master's right to hold the cargo pending the giving of proper security were exhaustively considered, with a full review of the authorities, by the Circuit Court of Appeals in 1896 in the case of *Wellman v. Morse*. In the course of the judgment the Court said:—

“With reference to the payment of general average the owners of the schooner were, according to strict law, theoretically entitled to receive it in cash before surrendering their lien, and were not holden to take security for it; and the owners of the cargo were likewise, by the same strict law, entitled theoretically to pay in money instead of giving security. Although, according to strict law, the right to payment of general average does not, perhaps, always await a discharge of the cargo (*Carv. Carr. by Sea*, 426—428), yet no Admiralty Court would enforce payment prior to an opportunity for its inspection by its owner for the purpose of determining its contributory value. This, nevertheless, would not prevent the filing of a libel in season to make good the lien if it became necessary. So that, practically, a prior discharge of the cargo is, in any event, necessary to enable the owner of the vessel to collect the amount due for general average. It was on this account well said, referring to payments alike for freight and general average, in *Abb. Shipp.* (13th ed.) 466, as follows:—

“‘The master, however, cannot detain the goods on board the ship until these payments are made, as the merchant would then have no opportunity of examining their condition.’

“Also, with reference to general average, it is expressly stated in *Lown. Gen. Av.* (4th ed.) 329, that if the master ‘retains the goods on board his ship he can claim no demurrage during the delay.’ All the authorities, as well as the reason of the law and the necessities of commerce, are to the same effect. . . .

“But a complete disposition of the case requires us to come somewhat nearer to the facts. We have already

(*n*) *The Water Witch's Cargo*, 29 Fed. 159.

(*o*) *Wellman v. Morse*, *supra*.

observed that, in the theory of the law, either party had the right to exact a cash settlement of the general average, and neither was holden, on the one side to give security, or on the other to accept it. Nevertheless, the almost universal practice is for the master, before delivering the goods, to take an average bond, and for the owners of the cargo to give such a bond. It is not necessary to enlarge on this. The reasons for it, if any one deems them necessary to be stated, can be found in Kay, Shipm. (2nd ed.) 201; Lown. Gen. Av. (4th ed.) 336, 337; *Huth v. Lamport* (already cited), 16 Q. B. D. 735, 736; and *Svendson v. Wallace* (already cited), 10 App. Cas. 404, 410. Indeed, the theoretical remedy of a cash settlement is so impracticable that Lowndes states, in substance, that something else is imperative. He says, indeed, that some other reasonable arrangement therefor 'has to be come to.' The conditions are so urgent, and the practice of giving and accepting security is so universal, that an Admiralty Court would look with disfavour, so far as in its power to do so, on any owner, either of a vessel or cargo, who refused to conform to it. . . .

"First, it was held that, inasmuch as the parties had waived their strict rights with reference to immediate payment, and each party had impliedly consented to conform to the usage by virtue of which an average bond was to be given and taken, the owner of the vessel was, in the eyes of the law, liable for refusing an average bond in a reasonable form, and insisting that it should contain unreasonable conditions. . . .

"On the other hand, it is evident, reciprocally, that the master, on surrendering his lien, is entitled to demand security of an effectual character, and of such nature as will leave open, in his behalf, all legal methods of determining any controversy which may arise, and of promptly enforcing whatever amount the result of such determination may show he is entitled to. While, on the one hand, he cannot foreclose any questions which the owner of the cargo is entitled to have determined, he, on the other, is not required to weaken his position substantially, or to surrender any methods of relief, or to delay it, except so far as the same may be unavoidable in view of the fact that he gives up his lien."

According to invariable custom in the United States, before the delivery of the merchandise, the consignees sign an average bond or

Form of
average
security
obtainable.

agreement, and, in addition, furnish a satisfactory guarantee. This guarantee is unlimited and is an absolute obligation to pay any average charges for which the particular shipment is liable. It is customary to accept the guarantee of underwriters legally doing business in the United States, or the guarantee of bankers or other satisfactory sureties.

Deposits.

When such guarantees are not available, a deposit is made with the trustees named in the average bond, who are usually the average adjusters.

A demand for a deposit cannot be legally enforced in this country, because if the demand is made, the consignee, by a writ of replevin, can obtain possession of his merchandise by signing a bond and giving security to the satisfaction of the Court; or, if the master takes action in Court to exercise his lien, the same result would ensue.

But in actual practice, where it is not convenient to give a guarantee, the consignees usually prefer to make the deposit rather than to resort to the Court procedure.

The deposits taken are placed in trust accounts and the interest earned on them is credited in the average statement.

When the shipowner places deposits in bank with his general funds, he is liable for interest on them at the legal rate, which in New York is 6 per cent. per annum.

Average bond
or agreement.

The form of average bond generally in use in the United States contains a brief recital of the alleged facts which gave rise to the general average; it names the trustees, and also the average adjusters who are to prepare the adjustment; and the parties thereto agree to furnish promptly to the adjusters such information as the latter may require in preparing the statement; it also provides for payment of what is due on condition that the statement is prepared in accordance with established laws and usages in similar cases. The execution of the average bond in no way prevents the cargo owner from contesting his liability for contribution, nor from showing that the general average loss occurred by reason of negligence or of unseaworthiness of the vessel; nor does it prevent him from inquiring whether the rule of apportionment adopted was in accordance with maritime law (*p*).

A cesser clause in a charter party does not relieve the charterer, who is also the owner of the cargo, from the obligation to contribute. The obligation springs from the law itself, and not from any contract (*q*).

(*p*) *Conrad v. Montcourt*, 138 Mo. 311; *Berry Coal Co. v. Chicago, &c. R. Co.*, 116 Mo. App. 214; *Broadnax v. Cheraw, &c.*, C. R. 157 Pa. St. 140; *L'Amerique*, 35 Fed. 835; *McAndrews v. Thatcher*, *supra*; *Wellman v. Morse*, *supra*.

(*q*) *Marwick v. Rogers*, 163 Mass. 50.

Money paid voluntarily upon a claim for general average cannot be recovered back (*r*). It is otherwise if the money is paid under protest to the master to obtain possession of the cargo held on an unfounded claim for general average (*s*).

A statement of average adjusters, made up pursuant to average bonds, is not conclusive as an award on submission to arbitrators (*t*).

The duty of having the adjustment made promptly, enforcing payments and exercising the lien to secure contributions from the cargo before its delivery, rests upon the master, or the owners of the vessel; and the lien must be exercised not only for the protection of the vessel but of the other property entitled to contribution, and the master or the owners are liable for neglect of this duty (*u*).

Duty to have adjustment prepared.

THE ADJUSTER.

As Gourlie observes (*x*), "In this country, as in England, the average adjuster occupies a peculiar and anomalous position." He is merely an expert, invested with no judicial authority, and is appointed, generally, by the representatives of the ship. His work is subject to review by the parties interested, and, therefore, his adjustment is not conclusive.

There are, however, certain points of difference between the work of the average adjuster in England and in the United States. Usually, in this country, the shipowner regards the adjuster as his adviser in practically all matters connected with the accident. He almost invariably communicates with the adjuster promptly on receipt of particulars of the accident; he requires his advice in matters of salvage assistance, and frequently the adjuster negotiates the contract with the salvor for sending assistance, and, later, the settlement of the salvor's claim, which requires him to take statements of facts and to confer with underwriters and others interested. If it is a case involving the handling of cargo damaged by a sacrifice, or of general shipwreck, the owner expects the adjuster to assume the full responsibility for the handling and disposition of the cargo, and the proper distribution of the proceeds. The adjuster takes the average security from the owners and underwriters of the cargo, and acts as trustee under the average bond or agreement. He collects the cargo valua-

(*r*) *Martin v. The Agathe*, 71 Fed. 528; *Phipps v. The Nicanor*, 44 Fed. 504.

(*s*) *Chamberlain v. Reed*, 13 Me. 357.

(*t*) *The Santa Anna Maria*, 49 Fed. 878; *The Alpine*, 23 Fed. 815.

(*u*) *Dupont v. Vance*, 19 How. 174; *Strong v. N. Y. Fireman's Ins. Co.*, 11 Johns. 323; *The Packet*, 3 Mason, 261; *Gillett v. Ellis*, 11 Ill. 519; *The Santa Ana*, 154 Fed. 800.

(*x*) Page 422.

tions and, after the average statement is completed, has the burden of making the collections and the responsibility of paying out the credit balances in exchange for the documents of title. If any of the features of the case involve litigation he is supposed to attend to and supervise such litigation.

As I understand it, in England the scope of the adjuster's work is not so extensive.

The services and disbursements of average adjusters, rendered in accordance with the terms of an average bond, or agreement, are maritime in their nature and the subject of proceedings in admiralty (*y*).

Commission
for collecting
and settling
general
average.

A commission of $2\frac{1}{2}$ per cent. is allowed on the total of the general average for the collection and settling of the average (*z*). This commission is not allowed merely as a matter of usage, but as a matter of law (*a*).

As the collection and settlement of the average is invariably attended to by the adjuster he receives this commission. If the ship's agents performed the service they would be entitled to it.

CONCLUSION.

In writing this appendix I have not deemed it necessary to deal with the subjects of capture, embargo, or ransom, and have dealt with bottomry and the sale of cargo to raise funds in only a very limited way. Cases of general average involving these questions are now very rare, and there has been no change in our law regarding them since Gourlie's work was issued.

(*y*) *Coast Wrecking Co. v. Phoenix Ins. Co.*, 7 Fed. 236; 13 Fed. 127, 382.

(*z*) *Barnard v. Adams*, 10 How. 270; *Sturgess v. Cary*, 2 Curt. 59.

(*a*) *Sturgess v. Cary*, 2 Curt. 382.

APPENDIX W.

THE LAW OF URUGUAY.

The law of general average which is in force in Uruguay is contained in Book III., Title XIV. of the *Código de Comercio* of 1865. It may be stated generally to be the same, in language and substance, as that of the Argentine Republic, with the following unimportant differences:—

1. The numbering of the Articles is not the same. Arts. 1482—1505 of the Uruguayan Code correspond to Arts. 1312—1335 of the Argentine; Arts. 1506—1509 take the place of Arts. 1336, 1337 of the Argentine; Arts. 1510—1522 correspond to Arts. 1338—1350 of the Argentine.

2. The definition of average in Art. 1482 is the same as that of the former Argentine Code, viz.: “*Se consideran averias todos los gastos extraordinarios que se hacen durante el viaje en favor del buque ó del cargamento ó de ambas cosas juntamente; y todos los daños que sobrevienen al buque ó á la carga, desde el embarco y salida hasta la llegada y descarga.*” “All the extraordinary expenses incurred during the voyage for the benefit of the ship or cargo, or of both conjointly; and all the damages suffered by the ship or the cargo, from the time of the loading and departure until the arrival and discharge, are considered averages.”

3. The 23rd section of Art. 1316 of the Argentine Code, referring to the expense of quarantine, is not found in Art. 1486 of the Code of Uruguay. On the other hand, the following passage is added at the end of § 1 of Art. 1486: “*Deben tambien considerarse como averia gruesa los salarios y gastos del buque detenido, mientras se hace el arreglo del rescate.*” “The wages and expenses of the vessel detained, during the settlement of the ransom, shall likewise be considered general average.”

4. Art. 1317 of the Argentine is repeated to the end of Art. 1487, and there is the following addition: “*Y sus cargamentos, hasta los cuales habria podido llegar el incendio, teniéndose en cuenta la disposicion del puerto ó rada, el viento que hacia entonces, la situacion que ocupaba cada buque, y otras circunstancias del caso.*” “And their

cargoes, so far as the same might have suffered from the fire, regard being had to the situation of the port or roadstead, the direction of the wind, the position occupied by each vessel, and other circumstances of the case."

5. Art. 1489 of the Uruguayan Code contains an additional section, No. 7, which is not in the Argentine: "*Los gastos que ocasione y los perjuicios que se puedan seguir de una cuarentena.*" "The expenses occasioned by, and the losses which may ensue from, a quarantine."

6. In Arts. 1494, 1495, 1497, the words "*por peritos nombrados por el Juez competente,*" "by experts appointed by the competent judge," replace "*por (dos) peritos arbitradores,*" in Arts. 1324, 1325, 1327 of the Argentine. Further, in Art. 1494, "*por el Juez competente,*" "by the competent judge," takes the place of "*por el tribunal de comercio del respectivo distrito*"; in Art. 1495, "*honorario de los peritos,*" "remuneration of the experts," takes the place of "*arbitraje*"; and in Art. 1496, "*Juzgado,*" "Court," takes the place of "*tribunal.*"

7. The following is the text of Arts. 1506—1509:—

1506. La justificación de las pérdidas y gastos que constituyan la avería común se practicará á solicitud del capitán y con citación de los interesados ó consignatorios que hubiese presentes.

El capitán, dentro de las veinticuatro horas del arribo del buque, presentará al juez letrado de comercio escrito de protesta, haciendo relación de todo lo ocurrido en el viaje, con referencia al diario de navegación, y acompañando testimonio de las diligencias ó protestas que hubiese hecho en otro punto de arribada, á fin de que, ratificado bajo juramento, declaren á su tenor, el piloto y dos ó tres de los marineros y al mismo tiempo el juez nombre peritos que presencien la apertura de las escotillas y reconozcan su estado y el arrumaje de la carga, informando por escrito sobre lo que hubieren observado.

1506. The proof of the losses and expenses which constitute the general average shall be made on the application of the captain, after the citation of the interested parties or consignees who may be present.

The captain shall within twenty-four hours after the ship's arrival, deliver a written protest to the commercial judge, containing an account of all that has occurred during the voyage, referring to the log, and accompanied by testimony of the measures taken or protests made in any other place of call, ratified on oath by the mate and two or three of the mariners, so that the judge can at the same time appoint experts to be present at the opening of the hatches, and take note of their condition and the stowage of the cargo, and make a written report of what they have observed.

1507. En caso de que las partes no se arreglaran amistosamente, el justiprecio del buque, carga, pérdidas y daños ó gastos de la avería se verificará por peritos que el juez nombre en virtud de su oficio judicial y con arreglo a las circunstancias de cada caso.

1508. Hecho el reconocimiento y el justiprecio de que hablan los dos artículos precedentes, el capitán presentará escrito para la declaración ó clasificación de pérdidas y gastos que deban comprenderse en avería simple ó gruesa, en párrafos numerados. El juez, con previa audiencia de los interesados ó consignatorios, determinará lo que por derecho corresponda; y en el caso de estimar necesario el recibir á prueba la causa por un breve término y tan sólo por vía de instrucción, lo proveerá así, debiendo limitarse la prueba á las declaraciones del capitán y tripulantes y á reconocimientos.

Al resolverse por el juez lo que corresponda sobre la declaración ó clasificación de avería, nombrará el perito contador que deba liquidar y repartir aquélla.

Esta operación sólo será ejecutiva desde que la apruebe el juez, con previa audiencia de las partes.

La obligación de activar su cumplimiento incumbe al capitán, que será responsable, por su negligencia ó morosidad, hacia los dueños de las cosas averiadas.

En ese caso y en el de omitirse por el capitán las diligencias de

1507. If the parties do not come to a friendly arrangement, the valuation of the ship, cargo, losses and average damage or expenditures shall be made by experts appointed by the judge in virtue of his judicial office and with regard to the circumstances of each case.

1508. After the survey and valuation referred to in the two preceding articles, the captain shall present a document for the declaration and classification of losses and expenditures, which must be set out as simple (particular) or general average, in numbered paragraphs. The judge, after hearing the interested parties, or the consignees, shall determine according to law; and in case he considers it necessary to postpone the cause for a short time for further evidence, by way of examination only, he shall do so limiting the evidence to the declarations of the captain and crew and to surveys.

The judge, having determined the declaration and classification of the average, shall appoint a skilled accountant to collect and distribute it.

This measure shall only be executory when the judge has sanctioned it, after hearing the parties.

The obligation to carry out the same falls on the captain, who shall be responsible for his negligence or delay to the owners of the damaged articles.

In this case, and in case the captain neglects to take the measures

que habla el presente artículo, podrán promoverlas los dueños del buque ó del cargamento, ó cualquiera otra persona interesada, sin perjuicio de la responsabilidad en que incurra el capitán.

1509. Si la distribución de la avería se hiciere en país extranjero y hubiere conformidad de las partes en que se efectúe ante el Cónsul de la República, nombrará éste los peritos y contador.

En defecto de Cónsul de la República, se ocurrirá á la autoridad que conozca de los negocios mercantiles.

specified in this article, the owners of the ship or cargo or any other interested party can do so, without prejudice to the responsibility incurred by the captain.

1509. If the adjustment of the average takes place in a foreign country, and the parties agree that it shall be made before the Consul of the Republic, he shall appoint the experts and accountant.

If there be no Consul of the Republic, they shall apply to the authority having cognizance of mercantile matters.

8. The second and fourth paragraphs of Art. 1513 of the Uruguayan Code differ slightly from those of Art. 1341 of the Argentine. The second paragraph of Art. 1513 is: "*Son pagados según la calidad designada en el conocimiento, si se han perdido per echazón.*" "If lost by jettison, they are paid for according to the quality stated in the bill of lading." The fourth paragraph is: "*Mediando echazon, son pagados bajo el pie de su valor real.*" "In case of jettison, they are paid for at their real value."

9. Art. 1515 of the Uruguayan Code differs from Art. 1345 of the Argentine, as it begins, "*Si en una misma tormenta, ó por efecto del mismo accidente se perdiere el buque,*" "Should the ship be lost in the same storm or in consequence of the same accident," and then continues "*no obstante, &c.,*" word for word as the latter; thus limiting the rule to the case in which the subsequent loss can be connected with the same cause of danger as the general average act.

APPENDIX X.



THE LAW OF VENEZUELA.

*CÓDIGO DE COMERCIO OF 1904.**Title VI.*

SECTION I.—OF AVERAGE.

706. Averages comprise:—

Every extraordinary expenditure incurred for the preservation of the ship, of the goods, or of both; and all damage sustained by the ship from her sailing until her arrival; or by the goods from the loading until the discharge at the port of destination.

Unless there be an agreement to the contrary, the provisions of the following articles shall be followed in cases of average.

707. Averages are of two classes: general or common, and simple or particular.

708. General or common average comprises all damage caused intentionally, after due deliberation, before or after the commencement of the voyage, to the ship and her cargo, conjointly or separately, for the common benefit, to save them from a peril of the sea: damage consequent on the sacrifice; and expenditures due to unforeseen causes, incurred for the common benefit at the times and in the manner stated, such as:—(1) Sums given by way of composition to ransom the ship and cargo; (2) articles jettisoned to lighten the ship, whether they belong to the cargo, to the ship, or to the crew; (3) cables, masts, anchors, and other articles, cut away, jettisoned, or abandoned to save the ship; (4) damage sustained by the ship or cargo by reason of operations undertaken to save the ship or the cargo; (5) expenses of lightening to enable the ship to enter any port or roadstead, in consequence of a storm or pursuit by an enemy; (6) expenses incurred to refloat a ship which has been run ashore to avoid capture or total loss; (7) damage sustained by the ship and cargo through measures taken to extinguish a fire on board; (8) the cost of curing and the maintenance of seamen and passengers wounded in the defence of the ship; the

wages of the former until their recovery, and indemnification for their injuries if they should have been maimed; (9) the wages, maintenance and indemnification for the ransom of members of the crew who, while rendering services to the ship or her cargo, were captured or detained by the enemy or by pirates; (10) the wages and maintenance of the crew, while the ship, after the commencement of the voyage, is detained by a foreign Power, or owing to a war which broke out while the ship and cargo were not free from their reciprocal obligations; (11) the same wages and board for the period during which the ship is obliged to remain in a port of refuge, to repair damage intentionally caused for the common benefit of all the interested parties; (12) the diminution in the value of goods necessarily sold at a port of refuge at low prices for the repair of damage to the ship, sustained through some accident classified as general average; (13) pilotage, and other expenses of entering and leaving a port of refuge, for a cause which must be considered general average; (14) the hire of warehouses and depots, in which the goods are placed which cannot be kept on board during the repair of general average damage; (15) the expenses of an unusual quarantine, not foreseen when the contract of affreightment was made, while the ship and cargo are detained thereby, including the wages and maintenance of the crew.

709. Simple or particular average comprises all damage and depreciation which are not intentionally caused for the common benefit of the ship and cargo, such as:—(1) Damage sustained by the goods through inherent vice, storms, seizure, shipwreck, and stranding; (2) expenses incurred to save them; (3) the loss of cables, anchors, sails, masts, or rigging, caused by a storm or other accident of the sea; (4) the expenses of putting into port in consequence of the fortuitous loss of these articles, or for want of provisions, or to repair a leak.

710. If on account of known shoals or sandbanks the ship cannot sail from her port of departure with her whole cargo on board, or cannot reach her destination without discharging part of her cargo into lighters, to lighten her, the expenses of such operation are not considered average. They must be borne by the ship, unless the contrary is stipulated in the charterparty or the bills of lading.

711. The provisions of the preceding articles with regard to the classification of general or particular average, are equally applicable to such lighters, and the articles loaded thereon.

712. If during the transit these lighters, or the goods on board of them, sustain loss or damage, deemed to be general average, the craft shall bear one-third thereof, and the goods the remaining two-thirds, which shall be apportioned as general average over the principal ship, the freight and the whole of the cargo.

713. Reciprocally, and until the goods laden on the lighters have been discharged at the place of their destination, they remain in a common adventure with the principal ship and the rest of the cargo, and contribute to general average which these may sustain.

714. Damage sustained or expenses incurred by reason of interior defects of the ship, its innavigability, or the fault or negligence of the captain or crew, are not considered general average, even though incurred intentionally, after due deliberation, for the benefit of the ship.

715. Pilotage, towage, and harbour dues are not average, but ordinary expenses to be borne by the ship.

716. A claim for average is not admissible, unless it exceeds one-hundredth part of the collective value of the ship and cargo, for general average, or of the damaged article, for particular average.

SECTION II.—OF JETTISON.

717. If the captain, to save the ship in case of a storm or of pursuit by an enemy, considers himself obliged to jettison any goods forming part of the cargo, break any part of the ship so as to facilitate the jettison, cut down masts, or abandon anchors, he shall first hold a consultation, and take the opinions of the principal members of the crew, and of the parties interested in the cargo who may be present. If there be a difference of opinion, that of the captain and the principal members of the crew shall be followed.

718. According to the judgment of the captain, assisted by the advice of the principal members of the crew, the least necessary articles, the heaviest and least valuable shall be jettisoned first: afterwards those nearest to the upper deck.

719. The captain shall, as soon as possible, enter in the log-book a minute of the consultation.

The said entry shall contain:—The reasons for the consultation; an account of the articles jettisoned and damaged, with such particulars as can be given; the signatures of those taking part in the consultation, or their reasons for refusing to sign.

720. At the first port into which the ship puts, the captain must, within twenty-four hours, deliver to the Commercial Judge, or if there be none, to some other judge of the place, a copy of the said entry, under oath that the statements therein are true. If the port be a foreign one, the copy shall be delivered to, and the oath taken before the Venezuelan Consul, or if there be none, before a magistrate of the place.

SECTION III.—OF GENERAL AVERAGE CONTRIBUTION.

721. Contribution in common to general average shall be made proportionately by the goods saved, and those lost by jettison or other measures of preservation, and one-half of the ship and freight.

The contribution shall be based on the value of the said things at the place of discharge, after deduction of the expenses of salvage.

722. The wages of the seamen are not liable to contribute.

723. It is the duty of the captain to apply at the place of discharge, before the authority specified in Art. 720, for the survey and valuation by experts, appointed officially, of the damage and losses which constitute the general average.

724. The goods jettisoned shall be valued at the market price in the place of discharge, according to the quality shown by the bills of lading and invoices, if there be any.

725. If the goods should prove to be of less (*sic*) value than is stated in the bill of lading, they shall contribute, if saved, on their value; if lost or damaged, they shall be contributed for according to the quality stated in the bill of lading.

If the goods should prove to be of inferior quality to that stated in the bill of lading, they shall contribute, if saved, according to the quality stated in the bill of lading; and if they have been lost or damaged, according to their value.

726. The apportionment by the experts of the general average losses and damage, shall be carried into effect after it has been sanctioned by the judge or consul, as the case may be.

727. Munitions of war, provisions, and the personal effects of the captain and crew do not contribute to general average; but the value of the same, if they have been jettisoned, is made good by contribution.

728. Goods for which there is no bill of lading or declaration by the captain are not contributed for, if jettisoned, but they contribute if saved.

729. Goods laden on deck are not contributed for, if jettisoned or damaged, but contribute, if saved. This provision does not apply to the coasting trade.

730. Goods which have not yet been embarked on the principal ship, nor on the boats or barges which ought to transport them to her, do not contribute to losses sustained by the ship in which they are to be carried.

731. If the ship is lost, notwithstanding the jettison of part of the cargo or other measures taken for her preservation, the obligation to contribute to general average ceases, and the damage and losses which have been sustained are considered particular average, to be borne by those interested in the articles which have sustained the same.

732. When, after the ship has been saved from the peril which occasioned the general average, the ship perishes through another accident in the course of her voyage, the articles saved from the former peril which have been preserved after the loss of the ship, contribute to the general average according to their value in their existing condition, after deducting the expenses of salving them.

733. Articles jettisoned do not contribute to the payment of damage sustained, after their jettison, by the goods saved.

734. In all the aforesaid cases, the captain and crew have a lien on the goods or their proceeds, for their interest in the contribution.

APPENDIX Y.

THE INTERNATIONAL GENERAL AVERAGE CONGRESSES.

In the years 1860 to 1864, a vigorous effort was made to establish throughout Europe, and for the Continent of North America, a uniform system of general average.

It was commenced under distinguished patronage. On the 3rd of May, 1860, a circular, signed, amongst others, by the Chairman of Lloyd's, the Chairman of the London General Shipowners' Society, the Chairman of Lloyd's Salvage Association, and the Chairmen of the Chambers of Commerce, the Underwriting Associations, and other mercantile bodies of Liverpool, Glasgow, Hull, and Bristol, was sent out, by way of invitation, to all the maritime countries of Europe, and to the United States. In this circular were set forth the serious evils which resulted from the want of uniformity in the legislation affecting general average; and a place and time were appointed for a meeting of delegates from the various English and foreign mercantile bodies, and others supposed to be most competent to discuss the subject.

This invitation was pretty largely responded to. The delegates who appeared at the first meeting represented the Netherlands' Trading Company of Amsterdam; the Board of Trade of Boston (U.S.); the Chambers of Commerce of Antwerp, Bremen, Bristol, Copenhagen, Edinburgh, Glasgow, Hamburg, Liverpool, Mobile, and New York; the Committee of Lloyd's; the Salvage Associations of London and Liverpool; the Boards of Underwriters of Boston, Copenhagen, Liverpool, New Orleans, and New York; and the Shipowners' Associations of Amsterdam, Dundee, Glasgow, Greenock, and Liverpool. There were also present average adjusters, underwriters, and lawyers from Amsterdam, Glasgow, London, Liverpool, and Manchester.

The first meeting took place at Glasgow, under the presidency of Lord Brougham, assisted by Lord Neaves. Papers were read, discussions ensued, and, finally, a series of resolutions were passed, which were as follows:—

THE GLASGOW RESOLUTIONS.

- § 1. As a general rule, in case of the voluntary stranding of a vessel, the loss or damage to ship, cargo, or freight, con-

sequent on such stranding, ought not to be the subject of general average: but without prejudice to such a claim in exceptional cases, upon clear proof of special facts.

- § 2. The damage done to ship, cargo, and freight in extinguishing a fire ought to be general average.
- § 3. The damage done to cargo by chafing and breakage, resulting from a jettison of part of the remainder of the cargo, ought not to be allowed in general average.
- § 4. The damage done to cargo, and the loss of it and of the freight on it, resulting from discharging it at a port of refuge in the way usual in that port with ships not in distress, ought not to be allowed in general average.
- § 5. The loss sustained by cutting away the wreck of masts accidentally broken ought not to be allowed in general average.
- § 6. The expense of warehouse-rent at a port of refuge on cargo necessarily landed there, the expense of re-shipping it, and the outward port-charges at that port, ought to be allowed in general average.
- § 7. The damage done to ship, cargo, and freight by carrying a press of sail, ought not to be allowed in general average.
- § 8. The wages and provisions for the ship's crew ought to be allowed to the shipowners in general average, from the date the ship reaches a port of refuge until the date on which she leaves it.
- § 9. When the amount of expenses is less than the value of the property finally saved, the contributing values of the ship, freight, and cargo ought to be their values to the owners of them respectively at the termination of the adventure.
- § 10. When the amount of the expenses is greater than the value of the property saved, the proceeds of the property so saved ought to be applied towards those expenses; and the excess of the expenses over the proceeds ought to be apportioned as if the whole property had finally reached its destination.
- § 11. In fixing the value of freight, the wages and port-charges up to the date of the general average act ought not to be deducted, and the wages and port-charges after that date ought to be deducted, from the gross freight at the risk of the shipowner.

Having drawn up their rules in language which appears not ill-adapted for conveying their meaning, the Glasgow meeting fell into the natural yet grievous error of employing an English Parliamentary draughtsman to put it into legal form—an error which cost them four years, and was, perhaps, fatal to their enterprise. Their concluding resolution was, that a Bill should be drawn up on the basis of these eleven rules, with the expectation that eventually steps might be taken for obtaining for their Bill such legislative sanction in this and other countries as would attain the object they had in view.

The Committee for managing the affairs of Lloyd's, on receipt of the report of their representative who was present at Glasgow, passed, at their meeting of October 10, 1860, two resolutions, the first of which expressed the thanks of the Committee to the several gentlemen who had come from abroad to attend this conference, and the second declared, "That this Committee take a strong interest in the subject discussed at Glasgow, and that they will gladly co-operate in the endeavour to carry out the very desirable object sought to be attained."

Six months had been assigned by the Glasgow meeting as the time to be given for turning their eleven resolutions into Parliamentary language. The task occupied two years, and the result was a very long, very obscure, and perfectly unsatisfactory Bill of 126 clauses. What was, perhaps, worst of all, the Committee of Lloyd's did not like the Bill, and appear to have extended their dislike to the whole scheme.

In 1862, many of the same delegates crossed the Atlantic and the Channel, with a zeal beyond all praise, to meet their English colleagues in London. No representative of Lloyd's was this time present to welcome them. Not permitting themselves to be discouraged by a reception so different from that which the previous attitude of Lloyd's Committee had led them to expect, the members steadily addressed themselves to their task, and, under the presidency of Sir Travers Twiss, for several days laboured through the clauses of the obnoxious Bill. Code-making, it was evident, was not an English accomplishment. Eventually, the Bill was found unmanageable, and the London Congress separated, after passing a resolution that another method of procedure should, for the future, be adopted; that a Committee should be appointed to decide upon and bring into shape a Bill or series of resolutions, having for their object the establishing one uniform system of general average throughout the mercantile world.

This Committee consisted of the following members:—E. E. Wendt, of London, chairman; L. R. Baily, Liverpool; J. R. Bradford, Boston; L. C. Driebeek, Rotterdam; T. C. Engels, Antwerp;

S. Gram, Copenhagen; G. W. Hastings, London; W. J. Lamport, Liverpool; E. Van Peborgh, Antwerp; E. N. Rahusen, Amsterdam; P. H. Rathbone, Liverpool; R. M. Smith, Edinburgh; J. J. Svensen, Copenhagen; E. Thune, Copenhagen; J. Wertheim, Amsterdam; and R. Lowndes, Liverpool, secretary.

The Committee, consisting of persons living at a distance from one another, carried on an interchange of argumentative discussion by means of a number of papers or pamphlets, which were printed and circulated amongst themselves. The ground being thus cleared, they were prepared for a third meeting or congress, which took place in the summer of 1864, at York. Sir Fitzroy Kelly, afterwards Lord Chief Baron of the Exchequer, presided; and there were present, besides the members of the Committee, many of the gentlemen who had attended the Glasgow meeting; amongst whom I must not omit to mention the Hon. W. Marvin, formerly judge of the Admiralty Court of Florida, who took an important part in the proceedings, and has since published a valuable report addressed to the American Board of Underwriters, whom he represented, giving an account of our proceedings, and appending much useful information as to foreign laws of average, some of which I have made use of in these appendices (*a*).

At the York meeting, the following code of rules, dealing with the principal points as to which there is at present a diversity of practice in different countries, was drawn up (*b*).

THE YORK RULES.

RULE I.—A jettison of timber or deals, or any other description of wood cargo, carried on the deck of a ship in pursuance of a general custom of the trade in which the ship is then engaged, shall be made good as general average in like manner as if such cargo had been jettisoned from below deck. Jettison of deck cargo.

No jettison of deck cargo other than timber or deals, or other wood cargo, so carried as aforesaid, shall be made good as general average.

(*a*) There were also present M. Crusemann, representing the Chamber of Commerce of Bremen; Dr. Franck, representing Hamburg and Lubeck; M. Delahaye, representing the Comité des Assurances of Paris; M. Kamensky, appointed by the Russian Government; Messrs. Richards, Hopkins, and Hale, average adjusters, of London; besides several representatives of English shipowning and insurance associations.

(*b*) On some points, as will be seen, the York Rules differ from those laid down at Glasgow. The difference is, no doubt, attributable to the fuller discussion which had taken place in the interim.

	Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel (<i>e</i>).
Damage by jettison.	RULE II.—Damage done to goods or merchandise by water which unavoidably goes down a ship's hatches opened, or other opening made, for the purpose of making a jettison, shall be made good as general average, in case the loss by jettison is so made good.
	Damage done by breakage and chafing, or otherwise from derangement of stowage consequent upon a jettison, shall be made good as general average (<i>d</i>).
Extinguishing fire on shipboard.	RULE III.—Damage done to a ship or cargo, and either of them, by water or otherwise, in extinguishing a fire on board the ship, shall be general average (<i>e</i>).
Cutting away wreck.	RULE IV.—Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average (<i>f</i>).
Voluntary stranding.	RULE V.—When a ship is intentionally run on shore because she is sinking or driving on shore or rocks, no damage caused to the ship, the cargo, and the freight, or any or either of them, by such intentional running on shore, shall be made good as general average (<i>f</i>).
Carrying press of sail.	RULE VI.—Damage occasioned to a ship or cargo by carrying a press of sail shall not be made good as general average (<i>f</i>).
Port of refuge expenses.	RULE VII.—When a ship shall have entered a port of refuge under such circumstances that the expenses of entering the port are admissible as general average, and when she shall have sailed thence with her original cargo or a part of it, the corresponding expenses of leaving such port shall likewise be so admitted as general average; and whenever the cost of discharging cargo at such port is admissible as general average, the cost of re-loading and stowing such

(*e*) The corresponding Rule I. of the York-Antwerp Rules, 1877, was as follows:—

“No jettison of deck cargo shall be made good as general average.

“Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.”

(*d*) Reproduced in the York-Antwerp Rules, 1877, with the addition of the final words: “In case the jettison is so made good.”

(*e*) Rule III. of the York-Antwerp Rules, 1877, was as follows:—

“Damage done to a ship and cargo, or either of them, by water or otherwise, in extinguishing a fire on board the ship, shall be general average, except that no compensation be made for damage done by water to packages which have been on fire.”

(*f*) Reproduced without alteration in the York-Antwerp Rules, 1877.

cargo on board the said ship, together with all storage-charges on such cargo, shall likewise be so admitted. *Except that any portion of the cargo left at such port of refuge, on account of its being unfit to be carried forward, or on account of the unfitness or inability of the ship to carry it, shall not be called on to contribute to such general average (g).*

RULE VIII.—When a ship shall have entered a port of refuge under the circumstances defined in Rule VII., the wages and cost of maintenance of the master and mariners, from the time of entering such port until the ship shall have been made ready to proceed upon her voyage, shall be made good as general average. *Except that any portion of the cargo left at such port of refuge on account of its being unfit to be carried forward, or on account of the unfitness or inability of the ship to carry it, shall not be called on to contribute to such general average (g).*

Wages and maintenance of crew in port of refuge.

RULE IX.—Damage done to cargo by discharging it at a port of refuge shall not be admissible as general average in case such cargo shall have been discharged at the place and in the manner customary at that port with ships not in distress (*h*).

Damage to cargo in discharging.

RULE X.—The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; *deduction being made for the shipowner's freight and passage-money at risk, of two-fifths of such freight, in lieu of crew's wages, port-charges, and all other deductions*; deduction being also made, from the value of the property, of all charges incurred in respect thereof subsequently to the arising of the claim to general average (*i*).

Contributory values.

RULE XI.—In every case in which a sacrifice of cargo is made good as general average, the loss of freight (if any) which is

Loss of freight.

(g) The sentence in italics was omitted in the York-Antwerp Rules, 1877.

(h) Reproduced without alteration in the York-Antwerp Rules, 1877.

(i) In the York-Antwerp Rules, 1877, the words "deduction being made from the shipowner's freight and passage money at risk of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice," were substituted for the words in italics.

caused by such loss of cargo shall likewise be so made good (*j*).

The framing of these rules was, up to 1876, the supreme effort of the International General Average Committee. The members separated, and, practically, nothing further was done. An attempt was made to induce the English Board of Trade to take the matter up; and it is said that representations have passed, by way of a commencement, between the English and French Governments on the subject. The truth is, the members of the Committee were men whose time was fully occupied with matters of more immediate personal concernment, and the delays of the English bureaux were obstacles which they were powerless to overcome. The indifference, if not hostility, of Lloyd's aided in wrecking the undertaking.

Dr. Franck, in a work of his published in Dresden, makes some severe but deserved animadversions on the impotent conclusion of this useful and, at one time, promising undertaking: "It was forgotten in England," says this learned writer, "that the object aimed at was—a law; and that the discussion and agitation for the establishing of a law was quite a different thing from bringing the law itself into being" (*k*).

It is interesting to learn, from Dr. Franck's work, that in 1871 the Italian Government proposed a Congress at Naples, for the discussion of various international questions, one of which was, the practicability of establishing one uniform code of general average for all countries (*l*).

Thus the matter stood until 1876. In that year it was taken up afresh by the "Society for the Reform and Codification of the Law of Nations." A Conference was held at Bremen, in 1876, which was followed, in 1877, by a Conference at Antwerp, largely attended by representatives from the more important mercantile bodies of the chief countries of Europe, and of the United States. At this Conference, which was presided over by Lord O'Hagan, the whole subject of general average was opened out, from various points of view, in the attempt to discover the best mode of establishing a uniform system. The result was somewhat remarkable: it was found, in the

(*j*) Reproduced without alteration in the York-Antwerp Rules, 1877.

The following rule (No. XII.) was added in 1877:—

"The value to be allowed for goods sacrificed shall be that value which the owner would have received if such goods had not been sacrificed."

(*k*) Herstellung eines allgemeinen Seegesetzbuches. Franck, 1873: p. 33.

(*l*) *Ibid.* p. 39.

opinion of an overwhelming majority of those present, that there was little or nothing that could with advantage be added to, or altered in, the York Rules. The alterations finally made in these Rules (which have already been indicated in the notes to the text of the Rules), were so slight, that it was resolved, as the simplest way of indicating this fact, to give to the new Rules the title of "The York and Antwerp (or York-Antwerp) Rules."

A few words are necessary to complete the history of the York-Antwerp Rules in their present form. After the Rules of 1877 had been adopted, a Central Committee was formed in London to consider the best means of introducing the Rules into general use. The success of the steps they took is indicated by the fact that, in 1878, owners of vessels representing about two-fifths of the total tonnage of the United Kingdom agreed to insert a clause in their charter-parties and bills of lading providing for the adjustment of general average in accordance with the York-Antwerp Rules. Their example was quickly followed by most underwriters, who by the insertion of a corresponding clause in their policies agreed to pay general average "as per York-Antwerp Rules, if in accordance with the contract of affreightment." The Corporation of Lloyd's, however, still withheld their support, on the ground that the Rules threw an undue liability upon the cargo, but it was open, of course, for any underwriter at Lloyd's to agree with the assured to insert a clause in the policy incorporating the York-Antwerp Rules. Similar movements in favour of the adoption of the Rules took place in all the leading maritime States of Europe, in the United States, and in the British Colonies; with hardly any serious opposition, the Rules were approved by shipowners and underwriters in these countries, and general effect was soon given to them in contracts of affreightment and policies of insurance.

After the Rules had been subjected to a practical test for some ten years, it was recognised that they did not entirely meet the requirements of modern commerce, and that a revision of some of their provisions was desirable. Accordingly, on the initiative of the Association of Average Adjusters of Great Britain, the question was brought up at the fourteenth Conference of the Association for the Reform and Codification of the Law of Nations, held at Liverpool in 1890. The former Association prepared a report for submission to the Conference, suggesting various alterations in and additions to the existing Rules. After a full discussion of the Report, certain amendments in the old Rules were agreed to, and a few entirely new Rules were added, the whole forming the Code known as

the York-Antwerp Rules, 1890, now almost universally adopted throughout the world. The following are their provisions:—

YORK-ANTWERP RULES, 1890.

RULE I.—JETTISON OF DECK CARGO.

No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel (*m*).

RULE II.—DAMAGE BY JETTISON AND SACRIFICE FOR THE COMMON SAFETY.

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

RULE III.—EXTINGUISHING FIRE ON SHIPBOARD.

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire (*n*).

RULE IV.—CUTTING AWAY WRECK.

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average (*o*).

RULE V.—VOLUNTARY STRANDING.

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably

(*m*) It has been held in Germany that damage done to a vessel in the act of jettisoning a deck cargo is admissible as general average, even where the jettison itself is not so admissible. See the judgment of O. L. G., Hamburg, 1900, *S.S. Skodsborg*, *supra*, pp. 549 and 559.

(*n*) As to the interpretation of this Rule, see *Greenshiel's v. Stephens*, [1908] 1 K. B. 51; App. Cas. 431, *supra*, p. 94.

(*o*) As to the practice in America regarding this Rule, where the wreckage in falling does damage to the ship, see Appendix V., *supra*, p. 743.

sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

RULE VI.—CARRYING PRESS OF SAIL. DAMAGE TO OR LOSS OF SAILS.

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

RULE VII.—DAMAGE TO ENGINES IN REFLOATING A SHIP.

Damage caused to machinery and boilers of a ship which is ashore and in a position of peril in endeavouring to refloat shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage (*p*).

RULE VIII.—EXPENSES LIGHTENING A SHIP WHEN ASHORE AND CONSEQUENT DAMAGE.

When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average (*q*).

RULE IX.—CARGO, SHIP'S MATERIALS, AND STORES BURNT FOR FUEL.

Cargo, ship's materials, and stores, or any of them necessarily burnt for fuel for the common safety at a time of peril, shall be

(*p*) The damage done to the machinery and boilers of a vessel in extricating her from a position of peril due to ice has been held in Germany to be allowable as general average. See the judgment of O. L. G., Hamburg, 1908, *S.S. Eros*, *supra*, p. 559.

See also the decisions in Holland as to "a position of peril" required by this Rule, *supra*, pp. 595, 596.

(*q*) It has been decided in Holland that, for the application of this Rule, it is sufficient that the vessel is ashore, without necessarily being in peril. See the cases cited *supra*, p. 596.

admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving shall be charged to the shipowner and credited to the general average.

RULE X.—EXPENSES AT PORT OF REFUGE, &c.

(a) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average (*qq*).

(b) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(c) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average (*r*).

(*qq*) See the dictum of Bigham, J., in *Westoll v. Carter* (1898), 3 Com. Cas. 112, that the cost of cutting a passage out through the ice was not part of the "corresponding expenses of leaving" the port.

(*r*) It has been pointed out to the Editors by Dr. E. N. Rahusen, of Amsterdam (who, it is interesting to note, is probably the only surviving member of the original Conference of 1860), that where the contract of affreightment is governed by the law of Belgium, France, or Holland, the fact of the vessel being condemned may not affect the treatment of the reloading and storage charges, as according to these laws, the master is bound, where the original ship is condemned at a port of refuge, to provide another ship to carry on the cargo to its destination under the original contract of affreightment. A similar provision is found in the Codes of the Argentine Republic, Mexico and Spain.

In the case of *Anglo-Argentine Live Stock Produce Agency, Ltd. v. Temperley S.S. Co., Ltd.*, [1899] 2 Q. B. 403, it was held that the words "all storage charges on such cargo" did not apply to the cost of supplying fodder and water for cattle on board a vessel during delay at a port of refuge; and even if the cattle had been discharged, Bigham, J., doubted if such expenses could properly be called storage charges.

(d) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

RULE XI.—WAGES AND MAINTENANCE OF CREW IN PORT OF REFUGE, &c.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in Rule X., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average (*s*). But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average (*t*).

RULE XII.—DAMAGE TO CARGO IN DISCHARGING, &c.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average when and only when the cost of those measures respectively is admitted as general average (*u*).

RULE XIII.—DEDUCTIONS FROM COST OF REPAIRS.

In adjusting claims for general average, repairs to be allowed in

(*s*) It has been held in England that wages of cattlemen during detention of a vessel at a port of refuge are not recoverable in general average under this Rule. (*Anglo-Argentine Live Stock Produce Agency, Ltd. v. Temperley S.S. Co., Ltd., supra.*)

(*t*) It may be that when the master is bound by law to forward the cargo by another vessel, when the original ship is condemned, the wages should be allowed up to the time of the substituted vessel's departure from the port of distress. See p. 798, note (*r*), *supra*.

(*u*) As to the cost of reloading and stowing cargo on board a substituted ship at a port of refuge under certain foreign laws, see p. 798, note (*r*).

general average shall be subject to the following deductions in respect of "new for old," viz.:—

In the case of iron or steel ships, from date of original register to the date of accident,—

<i>Up to</i> <i>1 year old</i> (A.)	{ All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
<i>Between</i> <i>1 and 3 years</i> (B.)	{ One-third to be deducted off repairs to and renewal of woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets and hawsers (other than wire and chain), awnings, covers and painting. One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, chain cables and chains, donkey engines, steam winches and connections, steam cranes and connections; other repairs in full.
<i>Between</i> <i>3 and 6 years</i> (C.)	{ Deductions as above under Clause B, except that one-sixth be deducted off ironwork of masts and spars, and machinery (inclusive of boilers and their mountings).
<i>Between</i> <i>6 and 10 years</i> (D.)	{ Deductions as above under Clause C, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets, and rigging.
<i>Between</i> <i>10 & 15 years</i> (E.)	{ One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.
<i>Over</i> <i>15 years</i> (F.)	{ One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.
<i>Generally</i> (G.)	{ The deductions (except as to provisions and stores, machinery, and boilers) to be regulated by the age of the ship and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

In the case of wooden or composite ships:—

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions:—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

In the case of ships generally:—

In the case of all ships, the expense of straightening bent ironwork, including labour of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartages, use of shears, stages and graving dock materials, shall be allowed in full.

RULE XIV.—TEMPORARY REPAIRS.

No deductions “new for old” shall be made from the cost of temporary repairs of damage allowable as general average.

RULE XV.—LOSS OF FREIGHT.

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act or when the damage to or loss of cargo is so made good.

RULE XVI.—AMOUNT TO BE MADE GOOD FOR CARGO LOST OR DAMAGED BY SACRIFICE.

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

RULE XVII.—CONTRIBUTORY VALUES.

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average

for property sacrificed: deduction being made from the shipowner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average (*x*).

Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

RULE XVIII.—ADJUSTMENT.

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules (*y*).

(*x*) A peculiar interpretation of this rule was given by the United States Circuit Court of Appeals in the case of *The Strathdon* (94 Fed. 206; 101 Fed. 600). The case is not, however, reported on this point, and the editors are indebted to Mr. K. W. Elmslie for the particulars in this note. In that case, a fire broke out on board, to extinguish which, water had to be used. The vessel also put into a port of refuge, where repairs were effected, subsequently to which she duly completed her voyage. The average adjusters calculated the contributory value of the vessel by taking the round arrived value, and deducting therefrom the cost of the repairs effected at the port of refuge which were not admissible as general average. The Court held, however, that according to the true interpretation of the rule, the vessel should contribute on her value on arrival (the round value), plus the amount made good for general average repairs. From the result so arrived at, there should be deducted (in accordance with the concluding paragraph of the rule) the total cost of the repairs at the port of refuge which were not allowed as general average, the result being that, in effect, the vessel had to contribute twice over on the cost of the repairs allowed as general average.

(*y*) In a case where the charter-party incorporated the York-Antwerp Rules, but the bill of lading did not, it was held in Belgium that effect had to be given to the contract as contained in the charter-party. See *The S.S. Germa* (1910), *supra*, p. 461, note (*a*).

It has been held in France that where part of the cargo is carried under a contract providing for the application of York-Antwerp Rules, and the contract for the remainder of the cargo contains no such provision, the adjustment as regards the whole of the cargo, the voyage being to a French port, must be drawn up in accordance with French law. See Appendix I., *supra*, p. 496, note (*a*).

In the case of *Ralli v. Troop* (1894), 157 U. S. 386, the United States Supreme Court held that the York-Antwerp Rules were not intended to deal with the underlying principles of general average, but only with certain subjects of contribution. See also to the same effect the judgment of Lord Alverstone, C. J., in *Greenshields v. Stephens* (1907), 13 Com. Cas. at p. 99 (C. A.).

APPENDIX Z.

RULES OF PRACTICE ADOPTED BY THE ASSOCIATION OF AVERAGE ADJUSTERS UP TO 1911.

(Only the Rules relating to General Average are shown here.)

NOTE.—Some of the undermentioned Rules are, as indicated, “Customs of Lloyd’s,” now by resolution of the Association incorporated amongst the Rules of Practice.

The preamble to the Customs was—

“Nothing can be called a ‘Custom of Lloyd’s’ which is determined by a decision of the superior Courts; for whatever is thus sanctioned rests on a ground surer than Custom. A ‘Custom of Lloyd’s’ then must relate to a point on which the law is doubtful, or not yet defined, but as to which, for practical convenience, it is necessary that there should be some uniform rule. By the term is here understood the Customs of English Adjusting, whether as affecting General or Particular Average.”

1. *Adjustments “for the Consideration of Underwriters.”*

That any adjustment prepared for the consideration of underwriters shall include a statement of the reasons of the average adjuster for making such adjustment, and, when submitted in conjunction with a claim for which underwriters are liable, shall be contained in an entirely separate document. To such adjustments the following note shall be appended, viz.:—

“This adjustment has been prepared by request, to enable the assured to submit the case to underwriters.”

2. *Interest and Commission for Advancing Funds.*

That, in practice, interest and commission for advancing funds are only allowable in average when, proper and necessary steps having been taken to make a collection on account, an out-of-pocket expense for interest and for commission for advancing funds is reasonably incurred.

3. *Agency Commission and Agency.*

That, in practice, neither commission (excepting bank commission) nor any charge by way of agency or remuneration for trouble is allowed to the shipowner in average, except in respect of services rendered on behalf of cargo when such services are not involved in the contract of affreightment.

4. *Duty of Adjusters in respect of Cost of Repairs.*

That in adjusting particular average on ship or general average which includes repairs, it is the duty of the adjuster to satisfy himself that such reasonable and usual precautions have been taken to keep down the cost of repairs as a prudent shipowner would have taken if uninsured.

5. *Claims for Damage to Ship's Machinery.*

That no claim for damage to ship's machinery shall be admitted into an adjustment unless a survey has been held upon such machinery by competent and disinterested engineers as soon as practicable after the occurrence of the casualty giving rise to the claim; a certificate of such survey, reporting as to the nature and cause of the damage, to be furnished to the adjuster; or unless clear proof be given to the adjuster that the holding of such survey or the obtaining of such certificate is impracticable, which proof is to be set forth on the face of the adjustment.

6. *Claims on Ship's Machinery.*

That in all claims on ship's machinery for repairs, no claim for a new propeller or new shaft shall be admitted into an adjustment, unless the adjuster shall obtain and insert into his statement evidence showing what has become of the old propeller or shaft.

7. *Water Casks (Custom of Lloyd's, 1876).*

Water casks or tanks carried on a ship's deck are not paid for by underwriters as general or particular average; nor are warps or other articles when improperly carried on deck.

8. *Basis of Adjustment.*

That in any adjustment of general average not made in accordance with British law it shall be prefaced on what principle or according to what law the adjustment has been made, and the reason for so adjusting the claim shall be set forth.

In all cases the adjuster shall give particulars in a prominent position in the average statement of the clause or clauses contained in the

charter-party and or bills of lading with reference to the adjustment of general average.

9. *Deckload Jettison (Custom of Lloyd's Amended, 1890-91).*

The jettison of a deckload carried according to the usage of trade and not in violation of the contracts of affreightment is general average.

There is an exception to this rule in the case of cargoes of cotton, tallow, acids, and some other goods.

In lieu of—(Custom of Lloyd's, 1876).

The general rule of law now is that the jettison of a deckload, carried by consent of the shipper, is general average, as between the parties who have assented to this mode of stowage. The exceptions are those trades in which there is a custom that the jettison shall be at the risk of the shipper or owner of the deckload.

Such customs may, perhaps, though not very correctly, be called "Customs of Lloyd's."

This custom exists with cargoes of cotton, tallow, acids and some other goods.

10. *Damage by Water used to extinguish Fire.*

That damage done by water poured down a ship's hold to extinguish a fire be treated as general average.

11. *Damage caused by Water thrown upon Burning Goods.*

That goods in a ship which is on fire, or the cargo of which is on fire, affected by water voluntarily used to extinguish such fire, shall not be the subject of general average if the packages so affected be themselves on fire at the time the water was thrown upon them.

12. *Voluntary Stranding (Custom of Lloyd's, 1876).*

The custom of Lloyd's excludes from general average all damage to ship or cargo resulting from a voluntary stranding.

This rule does not necessarily exclude such damage as is done by beaching or scuttling a burning vessel to extinguish the fire.

13. *Expenses lightening a Ship when ashore ("Custom of Lloyd's" as amended 1890-91).*

When a ship is ashore, and, in order to float her, cargo is put into lighters, and is then at once re-shipped, the whole cost of lightering, including lighter hire and re-shipping, is general average.

*In lieu of the following, formerly succeeding section (f) in
"Expenses at Port of Refuge."*

The above rules do not apply to the cost of lightening a ship when ashore, in case the cargo is put into lighters in order to float the ship, and is then at once re-shipped. In such cases, the whole cost of lightening, including that of re-shipping, is general average.

14. *Sails set to force a Ship off the Ground (Custom of Lloyd's, 1876).*

Sails damaged by being set, or kept set, to force a ship off the ground or to drive her higher up the ground for the common safety, are general average.

15. *Stranded Vessels: Damage to Engines in getting off.*

That damage caused to machinery and boilers of a stranded vessel, in endeavouring to refloat for the common safety, when the interests are in peril, be allowed in general average.

16. *Claims arising out of Deficiency of Fuel.*

That in adjusting general average arising out of deficiency of fuel the facts on which the general average is based shall be set forth in the adjustment, including the material dates and distances, and particulars of fuel supplies and consumption.

17. *Resort to Port of Refuge for General Average Repairs:
Treatment of the Charges incurred.*

That when a ship puts into a port of refuge in consequence of damage which is itself the subject of general average, and sails thence with her original cargo, or a part of it, the outward as well as the inward port charges shall be treated as general average; and when cargo is discharged for the purpose of repairing such damage, the warehouse rent and reloading of the same shall, as well as the discharge, be treated as general average. (See *Atwood v. Sellar.*)

18. *Resort to Port of Refuge on account of Particular Average Repairs: Treatment of the Charges incurred.*

That when a ship puts into a port of refuge in consequence of damage which is itself the subject of particular average (or not of general average), and when the cargo has been discharged in consequence of such damage, the inward port charges and the cost of discharging the cargo shall be general average, the warehouse rent of cargo shall be a particular charge on cargo, and the cost of reloading

and outward port charges shall be a particular charge on freight. (See *Svendsen v. Wallace*.)

19. *Treatment of Costs of Storage and Reloading at Port of Refuge.*

That when the cargo is discharged for the purpose of repairing, re-conditioning or diminishing damage to ship or cargo which is itself the subject of general average, the cost of storage on it and of reloading it shall be treated as general average, equally with the cost of discharging it.

20. *Expenses at a Port of Refuge (Custom of Lloyd's, Amended, 1890-91).*

When a ship puts into a port of refuge on account of accident and not in consequence of damage which is itself the subject of general average, then, on the assumption that the ship was seaworthy at the commencement of the voyage, the custom of Lloyd's is as follows:—

(a) All cost of towage, pilotage, harbour dues, and other extraordinary expenses incurred in order to bring the ship and cargo into a place of safety, are general average. Under the term "extraordinary expenses" are not included wages or victuals of crew, coals, or engine stores, or demurrage. (1876.)

(b) The cost of discharging the cargo, whether for the common safety, or to repair the ship, together with the cost of conveying it to the warehouse, is general average.

The cost of discharging the cargo on account of damage to it resulting from its own *vice propre*, is chargeable to the owners of the cargo. (1876.)

(c) The warehouse rent, or other expenses which take the place of warehouse rent, of the cargo when so discharged, is, except as under, a special charge on the cargo. (1876.)

(d) The cost of reloading the cargo, and the outward port charges incurred through leaving the port of refuge, are, when the discharge of cargo falls in general average, a special charge on freight. (1876.)

(e) The expenses referred to in clause (d) are charged to the party who runs the risk of freight—that is, wholly to the charterer—if the whole freight has been prepaid; and if part only, then in the proportion which the part prepaid bears to the whole freight. (1876.)

(f) When the cargo, instead of being sent ashore, is placed on board hulk or lighters during the ship's stay in port, the hulk-hire is divided between general average, cargo, and

freight, in such proportions as may place the several contributing interests in nearly the same relative positions as if the cargo had been landed and stored.

The amendment is in the preamble, which formerly read thus:—

When a ship puts into a port of refuge on account of accident or sacrifice, then, on the assumption that the ship was seaworthy at the commencement of the voyage, the custom of Lloyd's is as follows:—

21. Treatment of Costs of Extraordinary Discharge.

That no distinction be drawn in practice between discharging cargo for the common safety of ship and cargo, and discharging it for the purpose of effecting at an intermediate port or ports of refuge repairs necessary for the prosecution of the voyage.

22. Towage from a Port of Refuge.

That if a ship be in a port of refuge at which it is practicable to repair her, and if, in order to save expense, she be towed thence to some other port, then the extra cost of such towage shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

23. Cargo forwarded from a Port of Refuge.

That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on the whole cargo, but, in order to save expense, the cargo, or a portion of it, be transhipped by another vessel, or otherwise forwarded, then the cost of such transhipment (up to the amount of expense saved) shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

24. Cargo sold at a Port of Refuge.

That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on the whole cargo, or such portion of it as is fit to be carried on, but, in order to save expense, the cargo, or a portion of it, be, with the consent of the owners of such cargo, sold at the port of refuge, then the loss by sale including loss of freight on cargo so sold (up to the amount of expense saved) shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure; provided always that the amount so divided shall in no case exceed the cost of transhipment and/or forwarding referred to in the preceding rule of the Association.

25. Interpretation of the Rule respecting Substituted Expenses.

That for the purpose of avoiding any misinterpretation of the resolution relating to the apportionment of substituted expenses, it is declared

that the saving of expense therein mentioned is limited to a saving or reduction of the actual outlay, including the crew's wages and provisions, if any, which would have been incurred at the port of refuge, if the vessel had been repaired there, and does not include supposed losses or expenses, such as interest, loss of market, demurrage, or assumed damage by discharging.

26. *Damage caused to Cargo during Forced Discharge.*

That whenever the cost of discharging cargo is general average, all loss or damage necessarily arising to cargo therefrom shall be allowed in general average.

27. *Treatment of Damage to Cargo caused by Discharge, Storing, and Reloading.*

The damage necessarily done to cargo by discharging, storing, and reloading it, be treated as general average when, and only when, the cost of those measures respectively is so treated.

28. *Deductions from Cost of Repairs to Iron Vessels in adjusting General Average.*

That in adjusting claims for general average, repairs to iron vessels shall be subject to the following deductions in respect of "new for old," viz.:—

From Date of Original Register.

Up to 1 year old (A.)	{ All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 and 3 years (B.)	{ One-third to be deducted off repairs to and renewal of boilers and their mountings, woodwork of hull, masts and spars, furniture, upholstery, crockery, metal, and glassware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers, and painting. One-sixth to be deducted off wire rigging, ropes, and hawsers, chain cables and sheets, donkey engines, steam winches, steam cranes and connexions; other repairs in full.
Between 3 and 6 years (C.)	{ Deductions as above under Clause B, except that one-sixth be deducted off ironwork of masts and spars, and machinery other than boilers.

<i>Between</i> <i>6 and 10 years</i> (D.)	$\left\{ \begin{array}{l} \text{Deductions as above under Clause C, except that} \\ \text{one-third be deducted off ironwork of masts and} \\ \text{spars, repairs to and renewal of all machinery and} \\ \text{all hawsers, ropes, sheets, and rigging; one-sixth} \\ \text{to be deducted off chains and cables.} \end{array} \right.$
<i>After</i> <i>10 years</i> (E.)	$\left\{ \begin{array}{l} \text{One-third to be deducted off all repairs and re-} \\ \text{newals, except ironwork of hull and cementing.} \\ \text{Anchors to be allowed in full.} \\ \text{One-sixth to be deducted off chain cables.} \end{array} \right.$
<i>Generally</i> (F.)	$\left\{ \begin{array}{l} \text{The deductions (except as to provisions and stores,} \\ \text{machinery, and boilers) to be regulated by the age} \\ \text{of the vessel, and not the age of the particular} \\ \text{part of her to which they apply. No painting} \\ \text{bottom to be allowed if the bottom has not been} \\ \text{painted within six months previous to the date of} \\ \text{accident. No deduction to be made in respect of} \\ \text{old material which is repaired without being re-} \\ \text{placed by new, and provisions and stores which} \\ \text{have not been in use.} \end{array} \right.$

29. *Freight Sacrificed: Amount to be made good in General Average.*

That the loss of freight to be made good in general average shall be ascertained by deducting from the amount of gross freight lost, the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

30. *Basis of Contribution to General Average.*

When property saved by a general average act is injured or destroyed by subsequent accident, the contributing value of that property to a general average which is less than the total contributing value, shall, when it does not reach the port of destination, be its actual net proceeds; when it does it shall be its actual net value at the port of destination on its delivery there; and in all cases any values allowed in general average shall be added to and form part of the contributing value as above.

The above rule shall not apply to adjustments made before the adventure has terminated.

31. *Contributory Value of Ship.*

That in any adjustment of general average there shall be set forth the certificate on which the contributory value of the ship is based, or, if there be no such certificate, the information adopted in lieu thereof, and any amount made good shall be specified.

32. *Contributory Value of Freight.*

That freight at the risk of the shipowner shall contribute to general average upon its gross amount, deducting the whole of, and no more than, such port charges as the shipowner shall incur after the date of the general average act, and such wages of the crew as the shipowner shall become liable for after that date.

That in any adjustment of general average there shall be set forth the amount of the gross freight and the freight advanced, if any; also the port charges and wages deducted, and any amount made good.

33. *Vessel in Ballast and under Charter; Contributing Interests.*

That when a vessel is in ballast and under charter, the interests contributing to expenses or sacrifices incurred for the common safety are, in practice, the ship and the freight she is earning under the charter, computed as usual in the adjustment of general average, unless the expenses are salvage expenses specifically charged by a Court of Law or by arbitration to the vessel without any regard to the freight.

34. *Chartered Freight (ulterior): Contribution to General Average.*

That when at the time of a general average act the vessel has on board cargo shipped under charter-party or bills of lading, and is also under a separate charter to load another cargo after the cargo then in course of carriage has been discharged, the ulterior chartered freight shall not contribute to the general average.

35. *Deductions from Freight at Charterer's Risk.*

That freight at the risk of the charterer shall be subject to no deduction for wages and port charges, except in the case of charters in which the wages or port charges are payable by the charterer, in which case such freight shall be governed by the same rule as freight at the risk of the shipowner.

36. *Forwarding Charges on Advanced Freight.*

That in case of wreck, the cargo being forwarded to its destination, the charterer, who has paid a lump sum on account of freight, which is not to be returned in the event of the vessel being lost, shall not be liable for any portion of the forwarding freight and charges, when the same are less than the balance of freight payable to the shipowner at the port of destination under the original charter-party.

37. *Adjustment: Policies of Insurance and Names of Underwriters.*

That no statement shall be drawn up showing the amount of payments by or to the underwriters, excluding statements of particular average on ship now dealt with by rule of the Association, unless the

policies, or copies of policies of insurance, or certificates of insurance, for which the statement is required, be produced to the adjusters: and that such statement shall give the names of the underwriting firms and companies interested, and the amounts due on the respective policies produced.

38. *Sacrifice for the Common Safety: Direct Liability of Underwriters.*

That in case of general average sacrifice there is, under ordinary policies of insurance, a direct liability of an underwriter on ship for loss of or damage to ship's materials, and of an underwriter on goods or freight, for loss of or damage to goods or loss of freight so sacrificed as a general average loss; that such loss not being particular average is not taken into account in computing the memorandum percentages, and that the direct liability of an underwriter for such loss is consequently unaffected by the memorandum or any other warranty respecting particular average.

39. *Enforcement of General Average Lien by Shipowners.*

That in all cases where general average damage to ship is claimed direct from the underwriters on that interest, the average adjusters shall ascertain whether the shipowners have taken the necessary steps to enforce their lien for general average on the cargo, and shall insert in the average statement a note giving the result of their enquiries.

40. *Underwriter's Liability (Custom of Lloyd's, 1876).*

If the ship or cargo be insured for more than its contributory value, the underwriter pays what is assessed on the contributory value. But where insured for less than the contributory value, the underwriter pays on the insured value; and when there has been a particular average for damage which forms a deduction from the contributory value of the ship that must be deducted from the insured value to find upon what the underwriter contributes.

This rule does not apply to foreign adjustments, when the basis of contribution is something other than the net value of the thing insured.

41. *The Duty of Adjusters in Cases involving Refunds of General Average Deposits or Apportionment of Salvage, Collision Recoveries, or other Funds.*

That in cases of general average where deposits have been collected and it is likely that repayments will have to be made, measures be taken by the adjuster to ascertain the names of underwriters who have reimbursed their assured in respect of such deposits; that the names of

any such underwriters be set forth in the adjustment as claimants of refund, if any, to which they are apparently entitled; and that on completion of the adjustment, notice be sent to all underwriters whose names are so set forth as to any refund of which they appear as claimants and as to the steps to be taken in order to obtain payment of the same.

That in cases where the names of any underwriters are not to be ascertained on completion of the adjustment, notice be sent to the Secretary of Lloyd's, to the Institute of London Underwriters, to the Liverpool Underwriters' Association, and to the Association of Underwriters of Glasgow, notifying such interests as have not been appropriated to underwriters.

And that in cases of apportionment of salvage or other funds for distribution, similar measures be taken by the adjuster to safeguard the interests of any underwriters who may be entitled to benefit under the apportionment.

42. *"Memorandum" to Statements showing Refunds in respect of General Average Deposits.*

That the following memorandum shall appear at the end of statements which show refunds to be due in respect of General Average Deposits, viz.:—

Memorandum—Refunds of General Average Deposits shown in this statement should only be paid on production of the "original" deposit receipts.

YORK-ANTWERP RULES—

43. *Modification of York-Antwerp Rules in Contracts of Affreightment: Liability of Underwriters.*

That in all cases where the contract of affreightment provides for the application of York-Antwerp Rules in any modified or mutilated form, and when the policies of insurance provide for the application of York-Antwerp Rules, if in accordance with the contract of affreightment, in applying the claim to such policies no effect shall be given to York-Antwerp Rules.

44. *Allowance to be made in General Average under York-Antwerp Rules in respect of the Cost of Maintenance of Officers and Crew.*

That the amount to be allowed in general average under York-Antwerp Rules for the maintenance of officers and crew shall be the actual cost of such maintenance where proved; but where proof of actual cost is not furnished to the adjuster, the allowance shall be determined by the under-mentioned scale: provided that where evi-

dence of cost is produced, but is not conclusive, the allowance shall represent as nearly as possible the actual cost, but shall not exceed the under-mentioned scale, viz.:—

	OFFICERS (a)		CREW (b)
	per man per day		per man per day
Passenger Steamers (Liners) ...	4/-		1/3
Passenger Sailing Vessels ...	3/-		1/3
Cargo Steamers and Sailing Vessels	2/6		1/3

except that the allowance for Lascars shall be 9d. per man per day, and in the case of other Asiatic (native) crews shall be determined by the circumstances of each case.

(a) To include the master, deck officers, and engineers (in the case of a steamer), also the doctor and purser (if carried).

(b) To include the remainder of the ship's company.

APPENDIX AA.

WAREHOUSING CLAUSES OF THE MERCHANT SHIPPING
ACT, 1894, AND MERSEY DOCKS CONSOLIDATION
ACT, 1858.

MERCHANT SHIPPING ACT, 1894.

PART VII.—DELIVERY OF GOODS.

492. In this Part of this Act unless the context otherwise re-
quires—

Definitions
under
Part VII.

The expression "goods" includes every description of wares
and merchandise:

The expression "wharf" includes all wharves, quays, docks,
and premises in or upon which any goods, when landed
from ships, may be lawfully placed:

The expression "warehouse" includes all warehouses,
buildings, and premises in which goods, when landed from
ships, may be lawfully placed:

* * * * *

The expression "shipowner" includes the master of the
ship and every other person authorised to act as agent for
the owner or entitled to receive the freight, demurrage,
or other charges payable in respect of the ship:

The expression "owner" used in relation to goods means
every person who is for the time being entitled, either as
owner or agent for the owner, to the possession of the
goods, subject in the case of a lien (if any), to that lien:

The expression "wharfinger" means the occupier of a
wharf as herein-before defined:

The expression "warehouseman" means the occupier of a
warehouse as herein-before defined.

494. If at the time when any goods are landed from any ship,
and placed in the custody of any person as a wharfinger or ware-
houseman, the shipowner gives to the wharfinger or warehouseman
notice in writing that the goods are to remain subject to a lien for
freight or other charges payable to the shipowner to an amount

Lien for
freight on
landing
goods.

mentioned in the notice, the goods so landed shall, in the hands of the wharfinger or warehouseman, continue subject to the same lien, if any, for such charges as they were subject to before the landing thereof; and the wharfinger or warehouseman receiving those goods shall retain them until the lien is discharged as hereinafter mentioned, and shall, if he fails so to do, make good to the shipowner any loss thereby occasioned to him.

Discharge
of lien.

495. The said lien for freight and other charges shall be discharged—

- (1) Upon the production to the wharfinger or warehouseman of a receipt for the amount claimed as due, and delivery to the wharfinger or warehouseman of a copy thereof or of a release of freight from the shipowner, and
- (2) Upon the deposit by the owner of the goods with the wharfinger or warehouseman of a sum of money equal in amount to the sum claimed as aforesaid by the shipowner;

but in the latter case the lien shall be discharged without prejudice to any other remedy which the shipowner may have for the recovery of the freight.

Provisions as
to deposits
by owners of
goods.

496.—(1) When a deposit as aforesaid is made with the wharfinger or warehouseman, the person making the same may, within fifteen days after making it, give to the wharfinger or warehouseman notice in writing to retain it, stating in the notice the sums, if any, which he admits to be payable to the shipowner, or, as the case may be, that he does not admit any sum to be so payable, but if no such notice is given, the wharfinger or warehouseman may, at the expiration of the fifteen days, pay the sum deposited over to the shipowner.

(2) If a notice is given as aforesaid the wharfinger or warehouseman shall immediately apprise the shipowner of it, and shall pay or tender to him out of the sum deposited the sum, if any, admitted by the notice to be payable, and shall retain the balance, or, if no sum is admitted to be payable, the whole of the sum deposited, for thirty days from the date of the notice.

(3) At the expiration of those thirty days unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any disputes which may have arisen between them concerning the freight or other charges as aforesaid, and notice in writing of those proceedings has been served on

the wharfinger or warehouseman, the wharfinger or warehouseman shall pay the balance or sum to the owner of the goods.

(4) A wharfinger or warehouseman shall by any payment under this section be discharged from all liability in respect thereof.

497.—(1) If the lien is not discharged, and no deposit is made as aforesaid, the wharfinger or warehouseman may, and, if required by the shipowner, shall, at the expiration of ninety days from the time when the goods were placed in his custody, or, if the goods are of a perishable nature, at such earlier period as in his discretion he thinks fit, sell by public auction, either for home use or for exportation, the goods or so much thereof as may be necessary to satisfy the charges herein-after mentioned.

Sale of goods
by ware-
houseman.

(2) Before making the sale the wharfinger or warehouseman shall give notice thereof by advertisement in two local newspapers circulating in the neighbourhood, or in one daily newspaper published in London, and in one local newspaper, and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharfinger or warehouseman, or is otherwise known to him, send notice of the sale to the owner of the goods by post.

(3) The title of a *bonâ fide* purchaser of the goods shall not be invalidated by reason of the omission to send the notice required by this section, nor shall any such purchaser be bound to inquire whether the notice has been sent.

498. The proceeds of sale shall be applied by the wharfinger or warehouseman as follows, and in the following order:

Application
of proceeds
of sale.

(i) First, if the goods are sold for home use, in payment of any customs or excise duties owing in respect thereof; then

(ii) In payment of the expenses of the sale; then

(iii) In payment of the charges of the wharfinger or warehouseman and the shipowner according to such priority as may be determined by the terms of the agreement (if any) in that behalf between them; or, if there is no such agreement:—

(a) in payment of the rent, rates, and other charges due to the wharfinger or warehouseman in respect of the said goods; and then

(b) in payment of the amount claimed by the shipowner as due for freight or other charges in respect of the said goods;

and the surplus, if any, shall be paid to the owner of the goods.

499. Whenever any goods are placed in the custody of a wharfinger or warehouseman, under the authority of this Part of this

Warehouse-
man's rent
and expenses.

Act, the wharfinger or warehouseman shall be entitled to rent in respect of the same, and shall also have power, at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the wharfinger or warehouseman are necessary for the proper custody and preservation of the goods, and shall have a lien on the goods for the rent and expenses.

Warehousemen's protection.

500. Nothing in this Part of this Act shall compel any wharfinger or warehouseman to take charge of any goods which he would not have been liable to take charge of if this Act had not been passed; nor shall he be bound to see to the validity of any lien claimed by any shipowner under this Part of this Act.

Saving for powers under local Acts.

501. Nothing in this Part of this Act shall take away or abridge any powers given by any local Act to any harbour authority, body corporate, or persons, whereby they are enabled to expedite the discharge of ships or the landing or delivery of goods; nor shall anything in this Part of this Act take away or diminish any rights or remedies given to any shipowner or wharfinger or warehouseman by any local Act.

WAREHOUSING CLAUSES OF THE MERSEY DOCKS CONSOLIDATION ACT (1858).

(APPLICABLE TO ALL SHIPS IN THE LIVERPOOL CLOSE DOCKS.)

§ 7.—*As to Detention of Goods for Freight.*

Goods to remain subject to freight.

CXCIII. All goods warehoused by the Board or deposited in any of their warehouses by any person having or claiming an interest in such goods, or by the owner or master of the vessel out of which the same may have been warehoused, or by any person interested in the freight of such vessel or entitled to or claiming the benefit of any other claim or lien whatsoever to which the goods were subject while the same were on board any vessel and before the warehousing thereof, shall continue liable to such and the same claim or lien for freight, and also to all other claims or liens whatsoever in favour of the owner or master of such vessel, or of any other person interested in such goods or in the freight of the same, or entitled to or claiming the benefit of any other claim or lien thereon, as such goods were liable to whilst the same were on board such vessel and before the warehousing thereof.

Notice may be given to the Board to detain goods

CXCIV. And if notice in writing to detain such goods shall be given to the Board by such owner, or master, or other person interested as aforesaid, the Board shall detain and keep such goods in

their warehouses until such claims or liens, together with all rates, rents, and charges to which the same shall have become subject or liable, shall be paid, or until such rates, rents, and charges shall be paid, and a deposit equal in amount to the demand made by the owner or master of the vessel, or other person interested as aforesaid, for or on account of any such claim or lien as aforesaid, shall have been made by the owner of such goods, which deposit the Board shall receive and hold in trust until the amount due in respect of such claim or lien shall have been tendered or satisfied; when, upon proof thereof being given to the Board, and payment made to them of all rates, rents, and charges, if any, due upon such goods, such deposit shall be returned upon demand to the person by whom the same was made, or to his executors, administrators, or assigns.

CXCV. Nevertheless such deposit shall be considered as made in payment of the claim or lien in respect of which such deposit shall have been made; and the Board, on the expiration of fifteen days next after any such deposit shall have been made, and in case notice in writing to retain the amount of such deposit shall not in the meantime have been given to the Board by some person claiming to be entitled to such goods, shall (out of so much of the said deposit as shall remain after deducting and retaining the rates, rents, and charges, if any then due to the Board on the goods in respect of which such deposit shall have been made, and all other expenses, if any, incurred by the Board in respect thereof) pay to the master or owner of the vessel from which such goods shall have been warehoused, or other person entitled to or interested in such claim or lien, the amount of his claim or lien; and the payment so made by the Board shall release and discharge them from all claims and demands whatsoever in respect of so much of such deposit as they shall have paid to such master, owner, or other person interested as aforesaid.

CXCVI. But such notice to the Board to retain the amount of any such deposit as aforesaid shall not continue to operate or have effect for a longer period than thirty days from the service thereof, unless some action, suit, or other proceeding at law or in equity for determining the title or liability to the claim or lien in respect of which such deposit shall have been made, or the right to, or the ownership of, such deposit, shall in the meantime be actually commenced, and notice in writing thereof served on the Board or their solicitor.

CXCVII. If such deposit shall not be made within ninety days next after any such goods shall have been warehoused, and in case notice to detain such goods shall have been given as aforesaid, the Board may sell all or any part of such goods, and may, out of the proceeds thereof, in the first place, pay the duties (if any) payable

until freight, &c. be satisfied, or deposit paid.

Deposit to be considered as made in payment of claim.

Notice to have effect for thirty days only, unless action be brought.

Power of sale if deposit be not made.

to the Commissioners of Customs or Inland Revenue, and also retain and pay the rates and charges payable to the Board, and the expenses of such sale, and in the next place may pay the freight and other claims or liens to which such goods may be liable, rendering the overplus (if any) to the person entitled thereto, on demand.

The power of sale not to be exercised till after notice.

CXCVIII. No such sale shall be made by the Board until ten days' previous notice in writing of such claim or lien thereon as aforesaid, and of the intention to sell the same goods for satisfaction thereof, shall have been given to the owner thereof, if his name and residence or place of business shall appear on the manifest of the cargo, or shall have been entered in the books at the warehouse in which such goods shall have been deposited, by sending such notice in a registered letter by post to such residence or place of business; and if such owner shall not be known, then, until ten days after such notice shall have been inserted once in some newspaper published in London, and in two newspapers published in Liverpool, and also posted in the Exchange News-room at Liverpool, if so permitted by the proprietors or persons having the management of such News-room; and the Board shall not sell a greater portion of such goods than shall, in their judgment, be sufficient to cover the amount of the said duties, rents, charges, and expenses, and of such claim or lien as aforesaid.

Notice to detain goods must be given before warrants issued for delivery.

CXCIX. Notice to detain goods for payment of freight, or any other claims or liens to which such goods were liable whilst on board any vessel, and before the warehousing thereof, shall not be available unless the same shall be given to the Board before the issue by them of a warrant for the delivery of such goods as next hereinafter mentioned.

APPENDIX BB.

LLOYD'S AVERAGE BOND.

AN AGREEMENT made this day of 19
 BETWEEN Master of the Ship or Vessel called the
 and the several Persons whose names or Firms are
 set and subscribed hereto, being respectively consignees of
 Cargo on Board the said Ship of the other part
 WHEREAS the said Ship lately arrived in the Port of
 on a voyage from and it is alleged that during such
 voyage she met with bad weather and sustained damage and
 loss and that sacrifices were made and expenditure incurred
 which may form a Charge on the Cargo or some part thereof
 or be the subject of a *Salvage and/or* a general average con-
 tribution, but the same cannot be immediately ascertained,
 and in the meantime it is desirable that the cargo shall be
 delivered; Now THEREFORE THESE PRESENTS WITNESS and
 the said Master on his own behalf and on behalf of his Owners
 in consideration of the agreement of the parties hereto of
 the second part hereinafter contained, hereby agrees with the
 respective parties hereto of the second part that he will de-
 liver to them respectively their respective consignments on
 payment of the freight payable on delivery, if any, and the
 said parties hereto of the second part in consideration of the
 said Agreement of the said Master for themselves severally
 and respectively, and not the one for the others of them,
 hereby agree with the said Master that they will pay to the
 said Master or the Owners of the said Ship the proper and
 respective proportion of any *Salvage and/or* general average
 and/or particular and/or other charges which may be
 chargeable upon their respective consignments or to which
 the Shippers or Owners of such consignments may be liable
 to contribute in respect of such damage, loss, sacrifice, or
 expenditure, and the said parties hereto of the second part,
 further promise and agree forthwith to furnish to the
 Captain or Owner of the said Ship a correct account and

particulars of the value of the goods delivered to them respectively, in order that any such *Salvage and/or* general average and/or particular and/or other charges may be ascertained and adjusted in the usual manner.

This addition to be made to the agreement in those cases which justify the ship-owners in asking for a deposit.

And whereas at the request of the owner of the said Ship the parties hereto of the second part have respectively deposited or agreed to deposit in the Bank of _____ in the joint names of _____ nominated on behalf of the shipowners and _____ nominated on behalf of such Depositors the sum of £ _____ per cent. on the amount of the estimated value of their respective interests. Now it is hereby further agreed that the sum so deposited by the said parties respectively shall be held as security for and upon trust for the payment to the parties entitled thereto, of the *Salvage and/or* general average and/or particular and/or other charges payable by the said parties hereto of the second part respectively as aforesaid, and subject thereto upon trust for the said Depositors respectively.

This addition to be made when ad interim payments may have to be made by the trustees.

. Provided always that the said Trustees may from time to time, pending the preparation of the usual statement, pay to the said parties of the first part in respect of the amounts which may ultimately be found due from the said depositors respectively, and pay or refund to the parties hereto of the second part or any of them in respect of the amounts which may ultimately be found due to them, such sums out of the said deposits as may from time to time be certified by the Adjuster or Adjusters who may be employed to adjust the said *Salvage and/or* general average and/or particular and/or other charges to be a proper sum or proper sums to be advanced by the said Trustees on account of the said amounts. And it is hereby declared and agreed that any payment or payments on account which shall be made by the said Trustees under or in accordance with the statement or in pursuance of any Certificate to be made or given by the said Adjusters as aforesaid shall discharge such Trustees from all liability in respect of the amounts so paid; and it shall not be necessary for them to inquire into the correctness of the Statement or Certificate. Provided always that the deposits so to be made as aforesaid shall be treated as payments made without prejudice and without admitting liability in respect of the said alleged *Salvage and/or* general average and/or particular and/or other charges, and as though the same had been made by the depositors respectively for the purpose only of obtaining delivery of their goods; and in like manner all amounts returned by the Trustees to the depositors shall be received by the latter respectively without prejudice to any claim which the Master or Owners of the said ship may have against them respectively. And nothing herein contained shall constitute the said Adjuster or Adjusters an arbitrator or arbitrators, or

render his or their Certificate or Statement binding upon any of the parties.

IN WITNESS

LLOYD'S GENERAL AVERAGE GUARANTEE.

Guarantee by Lloyd's to the Shipowner.

Vessel

Voyage and Date

In consideration of the immediate delivery to the consignees thereof of the merchandise specified below, the Corporation of Lloyd's hereby undertakes to pay to the Shipowners any contribution for general average and/or salvage and/or other charges which may hereafter be ascertained to be due in respect of the said merchandise.

Description—

Secretary of Lloyd's.

Lloyd's, , 19 .

APPENDIX CC.

RULES OF PRACTICE OF THE ASSOCIATION OF AVERAGE
ADJUSTERS OF THE UNITED STATES.

(Effective on December 12th, 1910.)

I.—*Compensation and Expenses of Master.*

Where the voyage is broken up by reason of shipwreck or condemnation of the ship at a place short of the port of destination, the master shall be entitled to compensation from the general interests for the time necessarily occupied by him in transacting the business growing out of the disaster until his departure thence for the home port with the proceeds, general accounts and vouchers.

He shall also be entitled to a reasonable indemnification for his necessary expenses and services in returning to the home port when needed or required, by the peculiar circumstances of the case, to justify his acts at the place of disaster, or to give information, not otherwise afforded, to finally adjust and apportion the average charges to be paid by the general or special interests for whom such services are performed, to be determined by the nature of the case.

These rules shall apply whether the vessel be in ballast or with cargo.

II.—*Interest on Allowances in General Average.*

Where allowances, sacrifices or expenditures are charged or made good in general average, interest shall be allowed thereon at the legal rate prevailing at the place of adjustment.

III.—*Deck Load Jettison.*

Where cargo consisting of one kind of goods is, in accordance with a custom of trade, carried on and under deck, that portion of the cargo loaded on deck shall be subject to the same rules of adjustment in case of jettison and expenses incurred, as if the same were laden under deck.

IV.—*Loss of Freight on Cargo Sacrificed.*

When loss of freight on cargo sacrificed is allowed in general average, the allowance shall be for the net freight lost, to be ascertained by

deducting from the gross freight the expenses that would have been incurred subsequent to the sacrifice to earn it.

V.

When salvage services are rendered to a vessel, or she becomes disabled and is necessarily towed to her port of destination, and the expenses of such towage are allowable in general average, there shall be credited against the allowance such ordinary expenses as would have been incurred, but have been saved by the salvage or towage services.

VI.—*Credits for Old Material.*

Where old material is replaced by new, credit shall be given in the average statement for the value or proceeds of the old material, or, if there is no credit, the adjuster shall insert a note in explanation.

VII.—*Approval of Repair Accounts.*

All repair accounts shall be examined, when practicable, by the owners' surveyor and a surveyor for underwriters before the statement is issued.

The adjuster shall insert a note in the average statement that this has been done and the result of same.

VIII.—*Scraping and Painting Bottom of Vessel.*

The cost of scraping and painting the bottom of a vessel consequent upon repairs which are recoverable in average shall be allowed, unless the vessel, at the time of drydocking, is due in the ordinary course for bottom painting, according to the custom of the owners, or, in the case of a vessel employed in salt water navigation, unless the bottom has not been painted within one year.

When the cost of scraping and painting the bottom is allowed, the adjuster shall insert a note in the average statement giving the date of the last painting and the date on which, in the ordinary course, the vessel would have been due for repainting bottom.

IX.—*Drydocking Charges and Expenses Incidental to Drydocking—Particular Average.*

When a vessel is drydocked:—

- (1) For owners' account and repairs are found necessary for which underwriters are liable and which can only be effected in drydock; or
- (2) For survey and/or repairs for which underwriters are liable and repairs for owners' account are made which are immediately necessary for her seaworthiness, or she is

due for ordinary drydocking (in accordance with the owners' custom),
the cost of removing the vessel to and from the drydock, of docking and undocking, and as much of the dock dues as is common to both classes of work, shall be divided equally between the owners and underwriters.

When the vessel is drydocked for underwriters' account and the owners avail of her being in drydock to scrape and paint or to do other work for their own account which is not immediately necessary for seaworthiness, all the expenses incidental to the drydocking of the vessel shall be charged to the underwriters.

The adjuster shall insert a note in the average statement in explanation of the allowances made.

X.—*Overtime Work—Particular Average.*

The bonus or extra cost for overtime work on repairs shall be allowed up to the amount of the saving of drydock dues or other charges, which otherwise would have been incurred.

The adjuster shall insert a note in the average statement in explanation of the allowances made.

XI.—*Temporary Repairs—Particular Average.*

The cost of reasonable temporary repairs shall be allowed:—

When made in order to effect a saving in the cost of permanent repairs;

When complete repairs cannot be made at the port where the vessel is;

When the materials or parts necessary for permanent repairs are unobtainable at the port where the vessel is, except after unreasonable delay.

The adjuster shall insert a note in the average statement in explanation of the allowances made.

XII.—*Allowance in Respect of Provisions.*

When allowance is made in general average for provisions of Master, officers and crew the allowance shall be on the following scale:—

Master	...	...	...	...	...	\$1.00 per day.
Officers and Engineers	...	...	...	...	...	.75 " "
Crew	...	...	...	...	...	.50 " "

This rule shall apply to the Atlantic Coast ports of the United States and to ports in the Gulf of Mexico.

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